NO. 83-91

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

APTOS SEASCAPE CORPORATION,
a California corporation,

Appellant,

vs.

THE COUNTY OF SANTA CRUZ, et al.,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is it constitutionally permissible for a State Court to hold, unqualifiedly, that there shall never be a monetary remedy available to a landowner whose property has been taken by regulatory conduct over a period of years in violation of the Just Compensation Clause of the Fifth Amendment and contrary to the Civil Rights Act, 42 U.S.C. Section 1983?

2. When there has been a taking of private property for a public use in violation of the United States Constitution, does a proviso for so-called, amorphous "compensating densities" at some time in the indefinite future constitute "just compensation" within the meaning of the Fifth Amendment?

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JURISDICTIONAL STATEMENT [1/]

Opinions Below

1. **The Trial Court Judgment.** A jury having been waived by all parties and after an extremely lengthy court trial, the trial court found, inter alia, that the County had taken 70 acres of Seascape's property for public use in violation of the United States Constitution. The Court awarded to Seascape just compensation in the principal amount of $3,150,000 together with interest thereon and attorney's fees and costs.

1/ The parties are Aptos Seascape Corporation, a California corporation (Seascape); the County of Santa Cruz (County); and, as Amicus Curiae, the California Coastal Commission.

Pursuant to the same trial court Judgment, the County, at its sole option, could have agreed to provide Seascape with 200 so-called "compensating densities" on other properties owned by Seascape rather than paying $3,150,000 plus interest. [2/] Consent by the County to this alternate had to be exercised within sixty (60) days of the filing of the trial court Judgment. In the event that the County selected this alternate, the public agency still was required to reimburse costs of suit and attorney's fees to Seascape. The County did not exercise this option and, by the terms of the Judgment, obligated itself to pay monetary damages. A copy of the trial court Judgment is Appendix A and a copy of the Findings of Fact and Conclusions of Law of the trial court is Appendix B.

2. **Opinion of the California Court of Appeal.** The opinion of the California Court of Appeal was reported at 138 Cal.App.3d 484, 188 Cal.Rptr. 191. A copy of that opinion is Appendix C. The opinion of the Court of Appeal reversed the trial court Judgment awarding $3,150,000

2/ The alternate form of Judgment is in Appendix A. Highlighting the same reveals the following:

a. Within 60 days of the entry of the trial court judgment, the County had the opportunity to file a resolution accepting this option and enacting an enabling ordinance providing a mechanism for compensating densities. Page 10, paragraph 4E.

b. A five-year period was provided for the processing of 200 compensating higher densities by the County. Pages 8-9, paragraph 4C.

c. If the landowner was not provided all the 200 compensating higher densities within the five-year period, then $15,750, plus interest per unit, not so provided was set forth. Pages 8-9, paragraph 4C.

d. The Court further retained jurisdiction of this matter. Page 9, paragraph 4C.

e. The alternate, if not exercised by the County of Santa Cruz, was void. The County did *not* exercise this alternate. Page 11, paragraph 4F.

for the taking of the private property without just compensation, including the alternate judgment for 200 "compensating densities." The Court of Appeal further affirmed the trial court Judgment dismissing the Second Cause of Action for, inter alia, declaratory relief, damages and other relief. Nevertheless, it modified the same by providing, inter alia, that the dismissal is conditioned on the County granting "compensating densities" to Seascape at some time in the indefinite future. Appendix C, page 31. Further, *no* damages, whatsoever, including attorney's fees, costs and other damages, were allowed by the Court of Appeal. Each party is to bear its own costs. Appendix C, pages 49-50.

3. **Judgment.** The Opinion of the Court of Appeal was not a final Judgment until after Petitions for Rehearing were timely filed and denied and timely Petitions for a hearing by the California Surpeme Court were filed and, eventually, denied on April 20, 1983. Appendix G; 28 U.S.C. Section 1957; ***Banks v. State of California*** (1969) 395 U.S. 708. The Notice of Appeal was filed on July 12, 1983. Appendix I.

Concise Statement of Jurisdiction

This is an appeal from a "final judgment" of the "highest court of a state" as required by 28 U.S.C. Section 1257. [3/] Seascape seeks just compensation, damages and other relief pursuant to the United States Constitution and,

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3/ This appeal is from that portion of the judgment regarding Seascape v. County. *No* appeal is made to this Court from that portion of the Court of Appeal Judgment affirming the trial court Judgment in favor of Seascape on the County's cross-complaint.

also, the Civil Rights Act, 42 U.S.C. Sections 1983 and 1988. This includes a request for a reimbursement of attorney's fees and other substantial costs incurred in this matter.

The initial opinion of the Court of Appeal was handed down on December 23, 1982. Timely Petitions for Rehearing by the Court of Appeal were filed by all parties. Appendix D. The Petitions for Rehearing were denied by the Court of Appeal on January 21, 1983. Appendix E. Nevertheless, the Opinion rendered by the Court of Appeal was still not a "final judgment" entered by the "highest court of a state" as required by 28 U.S.C. Section 1257. ***Banks v. State of California*** (1969) 395 U.S. 708, 23 L.Ed.2d 653. Consequently, a timely Petition for Hearing by the California Supreme Court was filed by Seascape. Appendix F. After extending its time to act, the California Supreme Court eventually denied the Petitions on April 20, 1983. Appendix G. Although denying the Petitions for Hearing, three of the seven Justices of the California Supreme Court voted to grant a hearing. Appendix G. Thereafter, the Judgment of the Court of Appeal became a final "Judgment" upon the entry of the same by the Clerk and the issuance of the Remittitur on April 26, 1983. 28 U.S.C. Section 1257; ***Banks v. State of California*** (1969), ***supra***; Appendix H. A timely Notice of Appeal to this Court was filed on July 12, 1983. Appendix I.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1257(2). Cases sustaining the jurisdiction of the United States Supreme Court on appeal to review the State Court Judgment concerning regulatory takings of private property without just compensation are: ***Penn Central Transportation Co. v. City of New York*** (1978) 438

U.S. 104; *Moore v. City of East Cleveland* (1977) 431 U.S. 494; *Penn Coal Co. v. Mahon* (1922) 260 U.S. 393. [4/]

Constitutional and Statutory Provisions Involved

1. **Fifth Amendment, United States Constitution.**

   "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. **Ninth Amendment, United States Constitution.**

   "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

3. **Fourteenth Amendment, United States Constitution.**

   ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

4. **42 U.S.C. Section 1983.**

   "Every person who, under color of any statute, ordinance, regulation, custom, or useage, of any

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4/ Seascape also petitions this Court to invoke its jurisdiction by Writ of Certiorari pursuant to 28 U.S.C. Section 1257(3) and requests that this JURISDICTIONAL STATEMENT be regarded and acted on as a Petition for a Writ of Certiorari in accordance with 28 U.S.C. Section 2103. See also *Kulko v. Superior Court of California* (Cal. 1978) 436 U.S. 84, 56 L.Ed.2d 132; *Richmond Newspapers v. Virginia* (1980) 448 U.S. 555, 563-564, 100 S.Ct. 2814, 2820, 65 L.Ed.2d 973.

> state or territory, subjects, or subjects to be subject, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

5. Pertinent County ordinances are reproduced in Appendix J.

Raising the Federal Question

The complaint, the first amended complaint, the multitude of Seascape responses to County motions, the trial briefs, the appeal briefs, the Petition for Rehearing, and the Petition for a Hearing by the California Supreme Court filed by Seascape, all have raised the federal questions and alleged, inter alia, a taking of the subject property for public use without the payment of just compensation in violation of the United States Constitution.

Statement of the Case

Introduction

A few background factors are set forth hereinafter in order to aid the Court in its review of the matter. Although not all inclusive, the following clearly points out that this Court should take jurisdiction of this matter and, further, grant the Petition for Writ of Certiorari.

A. Subject Property

The subject property is composed of approximately 70 acres, consisting, generally, of beach and other land. Adjacent to the subject land on its northwestern boundary and near the coastline is a residential subdivision known as Tract No. 483. As a condition precedent to the 1963 purchase of the property, Seascape was to receive and did receive precise zoning of the land, including the subject 70 acres. The precise zoning of the subject property was provided in the form of "RM" zoning (multiple residential zone), C-2 (hotel), and R-1-BS-20 (residential, building site - 20 acres). This precise zoning permitted, as a matter of right, in excess of 1,000 units on the subject property. As a result of the County conduct over a period of time culminating on December 5, 1972, the density was reduced to zero (0) on the subject property.

B. Power to Expend Public Funds for Open Space.

The County has not only the power to expend public funds to purchase lands for parks, but also to purchase the fee or any lesser interest or right in real property in order to acquire, maintain or preserve open space and the same constitutes a ". . . public purpose . . ." for which "public funds may be expended." California Government Code Sections 6952, 6953 and 51073. The legislative authorization for public entities to expend public funds for the acquisition of open space is not an isolated provision of law. The California Legislature has decreed that every city and county must have in effect a local open space plan. It has

further required the adoption of an open space zoning ordinance by the agency consistent with such plan. California Government Code Sections 65563 and 65910. Nevertheless, the cost of this benefit to the public is to be borne *not* by the private property owner but, rather, by the public at large through the payment of just compensation to the landowner by the public entity. See California Government Code Section 65912.

The County has successfully acquired the subject 70 acres. Yet, rather than pay just compensation to the landowner, the public agency has used a series of actions and inactions over a number of years in a heretofore unsuccessful attempt to obfuscate Seascape's rights under the United States Constitution.

C. 1967 Aptos Area General Plan of the County of Santa Cruz.

The subject property is in the unincorporated area of the County, referred to as "Aptos." On September 26, 1967, the County adopted the 1967 Aptos Area General Plan. With the adoption of the 1967 Aptos Area Plan, the County announcement was made which has not been changed to the present time: that the 70 acres of the real property owned by Seascape shall remain in permanent open space for the benefit of the public.

Although the desire of the County to maintain the subject property in permanent open space for the benefit of the public has remained consistent, the commitment on the part of the County to deal fairly with Seascape and to avoid putting the entire public burden on a private citizen has completely wained. The 1967 Aptos Area General Plan

provided, specifically, for the creation of a Planned Community District as the mechanism for providing the landowner with so-called "compensating densities" in return for the placement of the subject 70 acres in permanent open space. No Planned Community District was ever formed by the County and the County Planning Director has acknowledged that *no* "compensating densities" were ever provided Seascape.

The adopted County Parks and Recreation and Open Space Plan (PROS) placed the acquisition of the Seascape beach in the category for an "immediate action." Boldly confirming that which the County had previously effectuated, the County placed the subject 70 acres in a "park/playground" designation in the subsequently adopted 1974 Aptos Area General Plan. This is the identical designation placed by the County on state-owned parks in the immediate vicinity of the subject 70 acres. Moreover, the subsequently adopted 1974 Aptos Area General Plan not only designated the subject 70 acres as "park/playground" but it also made *no* provision, whatsoever, for so-called "compensating densities."

D. Application for Residential Subdivision on Subject Property.

In March 1971, Seascape filed an application with the County for a residential subdivision on the subject property, Tract No. 553, Unit 7. In response, the Board of Supervisors adopted an Emergency Zoning Ordinance on April 6, 1971, freezing the property. On April 14, 1972, the County Planning Commission rejected Seascape's residential application. Seascape's Appeal to the Board of Supervisors of Santa Cruz County was denied on April 27, 1971.

Seascape, however, was not easily dissuaded. Despite the fact that the County violated California law by issuing *three* extensions of this interim emergency zone freezing the property — prolonging it from April 6, 1971 until the final adoption of Ordinance 1800 on December 5, 1972 — Seascape attempted to work with the County to salvage some sort of relief. See California Government Code Section 65858 (only two extensions to an emergency ordinance were allowed.) The Goetz Development Plan and the Eckbo EIR were submitted by Seascape to the County and were part of the whole record in the permanent zone studies that took place in 1971 and 1972. The Santa Cruz County Planning Commission did not allow Seascape's proposal for development of a portion of the subject 70 acres as requested in the Goetz Plan. Nevertheless, the County Planning Commission did recommend to the Board of Supervisors of Santa Cruz County that Seascape be provided 200 to 250 so-called "compensating densities" in return for leaving the subject 70 acres in permanent open space.

The County Board of Supervisors rejected the proposal of the County Planning Commission. During the hearings of the County Board of Supervisors and shortly before the adoption of Ordinance 1800 on December 5, 1972 (rezoning the subject 70 acres to UBS-50, *U*nclassified, *B*uilding *S*ite — *50* acres per unit *minimum* building site), the Board of Supervisors specifically inquired as to whether any credit could be provided Seascape in return for the placement of the subject 70 acres in the UBS-50 zone if, later, the landowner submitted a Planned Unit Development application on other properties. The County Planning Director correctly informed the County Board of Supervisors that *no* credit could be provided. Minutes of the Board of Supervisors, November 28, 1972. Shortly thereafter on December 5, 1972, the County Board of Supervisors repealed the

interim emergency zone and rezoned the subject 70 acres to UBS-50.

In addition to the above, in any Unclassified zone district (U), to even consider the granting of a *discretionary* use permit or a Planned Unit Development permit (PUD), by County regulation, the proposed use shall be consistent with the standards, densities and uses of the Aptos Area General Plan. County Ordinances, Sections 13.04.306, subparagraph c and 13.04.323, subparagraph c, Appendix J. See also, Findings of Fact, Trial Court Judgment, Appendix B, paragraphs 16, 19-24, pages 10, 11 and 12-15. In turn, both the 1967 Aptos Area General Plan and the 1974 Aptos General Plan specifically placed the subject 70 acres into permanent open space, with the 1974 Plan further categorizing it as "park/ playground" and making *no* provision, whatsoever, for any so-called "compensating densities." Moreover, not only County ordinances but State law requires that zoning shall be consistent with the Area General Plan. California Government Code Section 65860(a).

Thus, the County has rejected Seascape's residential land use application filed in March 1971 on the subject property, Tract No. 553, Unit 7. The County, through the rezoning studies and processes, has eliminated Seascape's land use proposals submitted to the County involving the subject property, commonly referred to as the Goetz Plan and the Eckbo EIR. The County has rejected its own Planning Staff and County Planning Commission's recommendation of 200 to 250 so-called "compensating densities." The County has even rejected the concept of "compensating densities" and placed the subject property in a "park/ playground" designation, via the 1974 Aptos Area General

Plan. Seascape has never received any so-called "compensating densities" or monetary compensation. The County has rejected the trial court's alternate judgment. The adopted County Parks, Recreation and Open Space Plan targeted Seascape's beach for acquisition. Furthermore, over the years, both in advance of and during the County's continuous activites, Seascape has repeatedly warned the County of the unconstitutional and confiscatory nature of that agency's conduct. To date, the County has blithely ignored all these warnings.

After a lengthy court trial, the trial court specifically determined, inter alia, that:

1. The landowner "has fully exhausted all available administrative remedies. Any additional attempt by the plaintiff to petition County for relief would have been a futile gesture." Appendix B, page 16, paragraph 31.

2. The subject 70 acres has been treated by the County as a separate parcel. The subject property is a de facto separate parcel from other lands owned by Seascape. Appendix B, page 15, paragraph 28.

3. "The County has used subterfuge to acquire the subject property as open space for the benefit of all the public without compensating plaintiff for its taking of subject property in any manner whatsoever." Appendix B, page 15, paragraph 25.

4. The "actions and inactions of the County culminating in ordinance 1800 adopted December 5, 1972 were invoked by the County in order to evade the requirement that the subject property must be acquired in eminent domain proceedings." Appendix B, pages 17-18, paragraph 36.

5. "County has taken subject property for the benefit of the public for open space and just compensation is due,

owing and payable by County to Seascape." Appendix B, page 17, paragraph 35.

6. "By its actions and inactions in culminating Ordinance 1800, the County has preserved the subject property for the benefit of the public for open space and park purposes thereby causing a taking of subject property for which just compensation is due, owing and payable by County to Seascape." Appendix B, pages 18-19, paragraph 37.

7. "By the actions and inactions of the County, culminating in the adoption of Ordinance 1800 adopted December 5, 1972, Seascape has been deprived of all reasonable, practicable, beneficial and economic use, and each of them, of subject property by County for which just compensation is due, owing and payable by County to Seascape." Appendix B, page 35, paragraph 1.

> "[A] reviewing court is without power to substitute its deductions for those of the trial court . . ." ***Campbell v. So. Pacific*** (1978) 22 Cal.3d 51, 60, 140 Cal.Rptr. 596.

Statement of Reasons Why the Questions Presented are Substantial and Require Consideration of This Court

A. The California Court of Appeal reversed the monetary judgment for inverse condemnation against the County based on the State Court decision of ***Agins v. Tiburon*** (1979) 24 Cal.3d 266, 273, affd. on other ground, ***Agins v. Tiburon*** (1980) 447 U.S. 255. Appendix C, pages 14-15. Nevertheless, the Court of Appeal did specifically acknowledge that ". . . the United States Supreme Court

may eventually conclude that California cannot limit the remedy available for a taking to nonmonetary relief . . ." Appendix C, page 15. Federal Courts of Appeal and some State Supreme Courts have already rejected the State Court decision in ***Agins*** by pointing out that the United States Constitution requires that monetary relief must be afforded to the landowner. ***Devines v. Maier*** (7th Cir. 1981) 665 F.2d 138, 142; ***Barbian v. Panagis*** (7th Cir. 1982) 694 F.2d 476, 482, fn. 5; ***In re Aircrash in Bali*** (9th Cir. 1982) 684 F.2d 1301, 1311, fn. 7; ***Martino v. Santa Clara Valley Water District*** (9th Cir. 1983) 703 F.2d 1141, 1147-1148; ***Fountain v. Metro*** (11th Cir. 1982) 678 F.2d 1038, 1043; ***Burrows v. City of Keene*** (N.H. 1981) 432 A.2d 15, 20; ***Pratt v. State*** (Minn. 1981) 309 N.W.2d 767, 774. Trial courts are following suit. ***Kinzli v. City of Santa Cruz*** (N.D. Cal. 1982) 539 F.Supp. 887, 896; ***Sheerr v. Township of Evesham*** (1982) 445 A.2d 46.

Whether a state must provide a monetary remedy to a landowner whose property has been taken by regulatory conduct of a public agency in violation of the Just Compensation Clause of the Fifth Amendment has been mentioned by this Court. ***San Diego Gas & Electric Co. v. City of San Diego*** (1981) 450 U.S. 621, 623-624, 101 S.Ct. 1287; ***Agins v. City of Tiburon*** (1980) 447 U.S. 255, 263, 100 S.Ct. 2138. This matter needs to be resolved and this case is the vehicle with which to do the same.

In ***San Diego Gas & Electric Co.***, the landowner never applied for a land development. ***Ibid.*** pages 629-630. The same is true in ***Agins*** wherein the residential zone allowed from at least one (1) home on five acres and up to five (5) homes on five acres and the landowner had not sought an approval for the development of the land. ***Ibid.*** 258. Seascape has made repeated efforts to use its land but to

no avail. The trial court's findings are quite clear in this regard. Seascape "has fully exhausted all available administrative remedies. Any additional attempt by the plaintiff to petition County for relief would have been a futile gesture." Appendix B, page 16, paragraph 31. 5/

The 70 acres are in permanent open space and "by the actions and inactions of the County culminating in the adoption of Ordinance 1800 adopted December 5, 1972, Seascape has been deprived of all reasonable, practicable, beneficial and economic use, and each of them, of subject property by County . . ." Trial Court, Appendix B, page 35, paragraph 1. Even the Court of Appeal decision acknowledges that the 70 acres are in permanent open space. *Eg.*, Appendix C, pages 3, 6 and 30.

The State court ***Agins*** decision is flatly contrary to the United States Constitution, including the Fifth and Fourteenth Amendments thereof. Thus, by this APPEAL, there is jurisdiction of this court. Further, pursuant to Rules of Court 17.1(a), (b) and (c), the State court has decided a Federal question in conflict with another state court as well as in conflict with Federal Appellate Court decisions.

B. In addition to the above, the State court decision, essentially, erases from the law the Civil Rights Act, 42 U.S.C. Sections 1983 and 1988. Neither the viability of the Civil Rights Act, Section 1983 in particular, nor the Federal Constitution can, in any manner, depend upon the states and/or the policies of the states. For example, in ***Testa v. Katt*** (1946) 330 U.S. 386, 390-391, the United States Court reviewed this subject and clearly concluded:

5/ The Civil Rights Act does not require the exhaustion of any purported administrative remedy. ***Patsy v. Board of Regents*** (1982) ____U.S.____, 102 S.Ct. 2557.

> "(*Claflin v. Houseman* (1976) 93 U.S. 130) repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts and the people 'anything in the Constitution or Law of any State to the contrary notwithstanding.' . . . *The obligation of states to enforce these federal laws is not lessened by the reason of the form in which they are cast or the remedy which they provide.* (Emphasis added.)

Likewise, in *Mondou v. New York* (1912) 223 U.S. 1 at 57, the United States Supreme Court dismissed the concept that State Courts could decline to enforce the federal statutes which did not suit the policies of the state.

42 U.S.C. Section 1983 and case law of the United States Supreme Court clearly indicate that this federal law necessarily provides for damages as a "vital component" and shall be ". . . construed generously to further its primary purposes." *Gomez v. Toledo* (1980) 44 U.S. 635, 639, 100 S.Ct. 1920, 1923; see also *Owen v. City of Independence* (1980) 445 U.S. 622, 650-651, 100 S.Ct. 1398, 1415.

> "The central aim of the Civil Rights Act was to provide protection to those persons wronged by the 'misuse of power by virtue of state law and made possible because the wrongdoer is clothed with authority of state law.' . . . A damage remedy against the offending party is a *vital* component to any scheme for vindicating cherished constitutional guarantees, the importance

> of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." (Emphasis added.)

This Court has recognized that an action can be brought under Section 1983 for overregulation. ***Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*** (1979) 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 408. And as stated by the court in ***Lynch v. Household Finance Corp.*** (1972) 405 U.S. 538, 552 (emphasis added):

> "Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right . . . In fact, a *fundamental interdependence* exists between the personal right to liberty and the other. *That rights in property are basic civil rights has long been recognized.*"

California is within the Ninth Circuit and a recent inverse condemnation and Civil Rights Act decision was handed down by the Court of Appeals in ***Martino v. Santa Clara Valley Water District*** (April 14, 1983) 703 F.2d 1141. The Court stated that the California Supreme Court in ***Agins*** was wrong and "that damages are recoverable for inverse condemnation." *Ibid.* 1148. Moreover, even assuming arguendo that ***Agins*** was correct, damages under Section 1983 are recoverable for overregulation. *Ibid.* 1148.

Federal trial and appellate courts, generally, have been consistent in concluding that the oppressive use of planning, zoning or police powers can be a violation of the Civil Rights Act and the United States Constitution requiring compensation. See, e.g., ***Wheeler v. City of Pleasant***

Grove (5th Cir. 1981) 664 F.2d 99; *Devines v. Maier* (7th Cir. 1981) 665 F.2d 138; *Dahl v. City of Palo Alto* (N.D. Cal. 1974) 372 F.Supp. 647; *Arastra Limited Partnership v. City of Palo Alto* (N.D. Cal. 1975) 401 F.Supp. 962; [6/] *Cordeco Dev. Corp. v. Vazquez* (D. Puerto Rico 1972) 354 F.Supp. 1355; *Shellburne, Inc. v. New Castle County* (D. Del. 1968) 293 F.Supp. 237, 245; *6th Camden Corp. v. Evesham Township* (D. N.J. 1976) 420 F.Supp. 709; *M.J. Brock & Sons, Inc. v. City of Davis* (N.D. Cal. 1975) 401 F.Supp. 354; *Rasmussen v. City of Lake Forest* (N.D. Ill. 1975) 404 F.Supp. 148; *Lerner v. Town of Islip* (E.D. N.Y. 1967) 272 F.Supp. 664; *Kinzli v. City of Santa Cruz* (N.D. Cal. 1982), *supra*.

Notwithstanding the California Constitution and the federal law requiring the State courts to follow and enforce the federal law including the Constitution, the California courts stubbornly refuse to recognize the law of the United States including the Civil Rights Act and the relief provided for thereunder. Article III, Section 1, California Constitution. This needs to be corrected.

C. The Court of Appeal decision admits that the "County's zoning ordinances are complex and ambiguous, and the relationship among the various sections is confusing as is apparent from the conflicting testimony from various officials charged at various times with administration of these ordinances." Appendix C, page 29. Nevertheless, the Court of Appeal goes on to eliminate the award of all monetary relief as well as the alternate judgment and, then, refers to some amorphous "compensating

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6/ As part of a settlement by which the City paid the property owners $7,500,000, this opinion was later vacated (417 F.Supp. 1125). See Berwanger, *Recent Developments in Judicial Relief for Owners of Land Limited to Public Open Space* (1976) 52 L.A. Bar Jour. 196, 197. (fn. 4.)

densities." [7] Appendix C, page 31. The reason for this not so subtle maneuver is the *Agins* decision of the California Supreme Court. This is merely an attempt by the State court to insulate California from the jurisdiction of the United States Supreme Court and the issue of whether a State court can unqualifiedly hold that there shall never be a monetary remedy afforded to a landowner whose property has been taken by the regulatory conduct of a public agency over a period of years. Further, a nonexistent mechanism for some sort of amorphous "compensating densities" in the indeterminate future cannot be used to obfuscate either the taking caused by the historical overreaching County conduct or the Fifth Amendment requiring "just compensation." [8]

Conclusion

The private property rights of individuals are in jeopardy, especially in California.

7/ As litigation lip service in this lawsuit, the County has incorrectly asserted some nonexistent, rococo way for some sort of "compensating densities." Yet, in reality, there is no such mechanism and the County has adamantly refused to provide "compensating densities" much less "just compensation" as demonstrated by its chronic, overreaching conduct for more than a decade.

8/ Some passing comments in both the majority and dissenting opinions were made by this Court in connection with a New York City ordinance in *Penn Central v. New York* (1978) 438 U.S. 104. Nevertheless, the sordid history of this case resulting from the overreaching conduct of the County is substantially different than the Penn Central case. Further, providing some sort of so-called "compensating densities" some indefinite time down the line for property already taken by the County just does not meet the Constitutional requirement for the payment of just compensation including the mandate for a certain and full equivalent. The taking of property through eminent domain proceedings initiated by the agency requires the award of monetary damages to meet the constitutional muster for "just compensation."

> "I confess to a growing unease about what I view as an accelerating erosion of private property rights of California citizens. . . . Pursuant to the Fifth Amendment to the Federal Constitution and Article I, Section 19, of the California Constitution, let state and city pursue established legal procedures to condemn the property in question, rather than upset long-established principles in order to obtain the property 'on the cheap' as it were." ***City of Venice v. Venice Peninsula Properties*** (1982) 31 Cal.3d 288, 316, 182 Cal.Rptr. 599, 616. (Dissenting Opinion)

The issues presented herein are critical and this Court's guidance, direction and protection are needed not only by Seascape but also by the citizens of California and other states. Thus, Seascape prays that probable jurisdiction be noted or that this Court grant the Petition for Writ of Certiorari pursuant to 28 U.S.C. Section 2103 and Rules of this Court, 17.1(a), (b) and (c).

Respectfully submitted,

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Aptos Seascape Corporation

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INDEX

APPENDIX A

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CRUZ

APTOS SEASCAPE CORPORATION, a California corporation,

Plaintiff,

vs.

THE COUNTY OF SANTA CRUZ, BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CRUZ, et al.,

Defendants.

THE COUNTY OF SANTA CRUZ, a body corporate and politic, on behalf of itself, its citizens and the People of the State of California,

Cross-Complainant,

vs.

APTOS SEASCAPE CORPORATION, a California corporation, et al.,

Cross-Defendants.

JUDGMENT
No. 50142

FILED
JAN 18 1979
By /s/ RICHARD C. NEAL, Clerk
Deputy Santa Cruz County

This cause having come on regularly for trial before the HONORABLE ROLAND K. HALL, Presiding Judge, a jury having been waived, commencing on May 8, 1978, and concluding on July 14, 1978; plaintiff APTOS SEASCAPE CORPORATION being represented by counsel, Adams, Levin, Kehoe, Bosso, Sachs & Bates by DENNIS J. KEHOE and PHILIP R. BATES and Garrison, Townsend and Hall, by PETER L. TOWNSEND; defendants COUNTY OF SANTA CRUZ, BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CRUZ, and PLANNING COMMISSION OF THE COUNTY OF SANTA CRUZ and cross-complainant COUNTY OF SANTA CRUZ on behalf of itself, its citizens and the people of the State of California, being represented by counsel, CLAIR A. CARLSON, County Counsel, JAMES M. RITCHEY, Assistant County Counsel, and JOHN BRISCOE, Special Assistant County Counsel; and

The STATE OF CALIFORNIA and the CALIFORNIA LANDS COMMISSION, as cross-defendants, having

been dismissed with prejudice by cross-complainant, COUNTY OF SANTA CRUZ; and

The Court having heard the testimony and considered the evidence, and, the Court having, at the request of defendant COUNTY, personally viewed the Subject Property and the surrounding lands and benchlands, in the presence of all counsel, the Court Reporter having been excused from being in attendance at said viewing pursuant to the stipulation of all parties; the matter having been argued and briefed and submitted; and the Court having rendered its Memorandum of Intended Decision; and Findings of Fact and Conclusions of Law having been requested by defendant COUNTY, and having been settled and made and filed herein; the Court having found that the activities of the defendants with respect to plaintiff's property constituted a taking of plaintiff's property, described in Exhibit "A" attached hereto and incorporated herein; it further appearing to the Court that the use for which said property was taken is a public use for which

the expenditure of public funds is authorized by law and the acquisition of the same is necessary for such use, and that plaintiff is entitled to damages for said taking; it appearing that the plaintiff is entitled to judgment as herein provided; and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff APTOS SEASCAPE CORPORATION have judgment against the defendants, and each of them, for the taking by the defendants, and each of them, of the property described in Exhibit "A" attached hereto and incorporated herein by reference.

2. Plaintiff, APTOS SEASCAPE CORPORATION, have judgment against the defendants, and each of them, in the sum of THREE MILLION ONE HUNDRED FIFTY THOUSAND DOLLARS ($3,150,000.00) plus interest at the rate of seven percent (7%) per annum beginning December 5, 1972 until paid in full. Plaintiff, APTOS SEASCAPE CORPORATION, is awarded

against defendants, and each of them, costs of suit in the inverse condemnation proceedings; the fees in the inverse condemnation proceedings for the following experts: Gerald Tucker, H. Rich Bramwell, Byron Cunningham, Robert Williams, Tom Williams, Fred J. Werdmuller, and Jo Crosby & Associates; attorneys' fees incurred by APTOS SEASCAPE CORPORATION with the law firm of ADAMS, LEVIN, KEHOE, BOSSO, SACHS & BATES for the inverse condemnation proceedings. Costs of suit, expert fees, and attorneys' fees provided for herein shall be specified by APTOS SEASCAPE CORPORATION in a Memorandum of Costs and the defendants are entitled to a Court hearing if there is a dispute as to said amounts provided that the defendants file the appropriate Motion to Tax Costs. APTOS SEASCAPE CORPORATION is ordered to convey fee title to Subject Property to the COUNTY OF SANTA CRUZ upon receipt of full payment of this judgment.

3. The defendant's zoning enactments were valid exercises of the police power and beyond constitutional attack except in proceedings for damages in inverse condemnation. Judgment dismissing the Second Count in the First Amended Complaint for Damages for Inverse Condemnation and Declaratory Relief on file herein is hereby made.

4. As an alternate means of compensation to plaintiff, APTOS SEASCAPE CORPORATION, for the taking of the Subject Property, and in liew of the payment of said THREE MILLION ONE HUNDRED FIFTY THOUSAND DOLLARS ($3,150,000.00) and interest thereon, the defendants, and each of them, at their option, may agree to the following and, if so, the same is hereby ordered, adjudged and decreed:

A. APTOS SEASCAPE CORPORATION, plaintiff herein, is hereby granted compensating higher densities of 40 residential units on its benchlands and 160 residential units on its uplands. These compensating higher densities are in addition to any other uses

and densities that the benchlands and uplands of the plaintiff may otherwise yield, which underlying uses and densities are herein referred to as "Base Densities". Said Base Densities shall be reasonable and shall not be reduced for the purpose of avoiding the effect of this Judgment. Defendants in determining the Base Densities of the benchlands and uplands of plaintiff shall not consider the fact that there are compensating higher densities vested in APTOS SEASCAPE CORPORATION for those lands so as to cause the defendant to reduce down the otherwise Base Densities. To do otherwise would constitute a violation of this Judgment in that the compensating higher densities to which APTOS SEASCAPE is entitled to over the Base Densities would be a sham and APTOS SEASCAPE would thereby be deprived of compensation to which it is entitled. APTOS SEASCAPE CORPORATION is hereby entitled to the above-mentioned compensating higher densities over and above the Base Densities.

B. Upon the issuance of building permits by defendants and substantial construction based thereon by APTOS SEASCAPE CORPORATION or its nominees for said 200 units of compensating higher densities over and above the Base Densities, APTOS SEASCAPE CORPORATION shall convey by deed an open space easement in perpetuity for the Subject Property described in Exhibit "A" to the COUNTY OF SANTA CRUZ. Since the remainder of the Subject Property may be more of a liability than an asset, at the time of such conveyance and at the option of APTOS SEASCAPE CORPORATION, APTOS SEASCAPE CORPORATION may transfer fee title to the COUNTY OF SANTA CRUZ and the COUNTY OF SANTA CRUZ shall accept the same.

C. If plaintiff has not received all of the compensating higher densities from COUNTY as called for in this Paragraph 4 within five (5) years from the date of the entry of this Judgment, plaintiff shall be entitled to the monetary compensation called for in

this Judgment together with interest thereon from December 5, 1972. In the event that plaintiff has received from COUNTY some but not all the compensating higher densities as called for herein within said five (5) year period, to the extent that plaintiff has not received said compensating higher densities, plaintiff shall be entitled to the monetary compensation of FIFTEEN THOUSAND SEVEN HUNDRED FIFTY DOLLARS ($15,750.00) plus interest from December 5, 1972, for each unit of compensating higher densities not so received by plaintiff from COUNTY within said five (5) year period. Receipt of a unit of compensating higher densities means the issuance by defendants to APTOS SEASCAPE CORPORATION or its nominees of a building permit for the construction of a unit over and above the Base Densities.

This Court shall retain jurisdiciton in this matter to insure that APTOS SEASCAPE CORPORATION receives the benefit of this compensation.

D. No matter which method of compensation is chosen by the defendants, APTOS SEASCAPE CORPORATION is awarded against defendants costs of suit, expert fees and attorneys' fees as provided for hereinabove.

E. This alternate is at the option of the defendants. In order to exercise this alternate, the defendants shall, within sixty (60) days of the date of the filing of the entry of judgment herein:

(1) File with the Court with a copy to the attorneys for the plaintiff written acceptance and agreement to provide the compensation pursuant to this Paragraph 4 of this Judgment. Said notice shall be accompanied by a certified copy of a resolution of the Board of Supervisors authorizing the acceptance of this option.

(2) Enact enabling ordinances providing for compensating higher densities to plaintiff as required by this Paragraph 4.

F. In the event that the defendants do not exercise this alternate pursuant to this Paragraph 4 or if this alternate is ruled illegal by a higher Court, this alternate shall be void and any exercise of the option by the defendants under this alternate shall be void and the method of compensation otherwise provided for in this Judgment shall remain in full force and effect.

5. Judgment on the Cross-Complaint and Amendments thereto is hereby entered in favor of APTOS SEASCAPE CORPORATION, cross-defendant, and against cross-complainant, COUNTY OF SANTA CRUZ, a body corporate and politic, on behalf of ifself and citizens and people of the STATE OF CALIFORNIA. Furthermore, cross-defendant, APTOS SEASCAPE CORPORATION, is hereby awarded costs of suit with respect to the Cross-Complaint and Amendments thereto.

6. Defendant and cross-complainant, COUNTY OF SANTA CRUZ, on behalf of itself, its citizens and the

people of the STATE OF CALIFORNIA, shall take nothing by its Cross-Complaint.

7. The Clerk is hereby ordered to enter this Judgment.

Dated: January 17, 1979

/s/ ROLAND K. HALL
ROLAND K.HALL
JUDGE OF SUPERIOR COURT

EXHIBIT A

SITUATE IN THE COUNTY OF SANTA CRUZ, STATE OF CALIFORNIA

BEING a part of the Aptos and San Andreas Ranchos and more particularly bounded and described as follows, to wit:

BEGINNING at the Southern corner of Lot 1 as said lot is shown on map entitled "Seascape Beach Estates Tract 483, Unit One" filed in Volume 48 of Maps at Page 43, Santa Cruz County Records.

THENCE FROM SAID POINT OF BEGINNING along the Southeastern boundary of said Tract 483 North 48° 44' 50" East 245.00 feet to the Southern corner of Lot 6 as said lot is shown on Map entitled "Seascape Beach Estates Tract 511, Unit Four" filed in Volume 50 of Maps at Page 283, Santa Cruz County Records. Thence along the Southeastern boundary of

said Lot 6 North 61° 16' 08" East 25.91 feet to the Western corner of Lot 7 in said Tract 511; thence along the Southwestern boundary of said Tract 511, South 41° 15' 10" East 871.62 feet to the Southern corner of Lot 19 in said tract; thence along the Southeastern boundary of said Tract 511 North 48° 44' 50" East 84.44 feet; thence leaving said last mentioned boundary South 54° 15' East 50.35 feet; thence North 80° 35' East 45.00 feet; thence South 29° 00' East 26.00 feet; thence South 52° 20' West 30.00 feet; thence South 29° 20' East 32.00 feet; thence South 42° 35' East 39.00 feet; thence South 48° 30' East 102.00 feet; thence South 16° 00' East 58.00 feet; thence South 29° 00' East 70.00 feet thence North 82° 00' East 15.00 feet; thence North 57° 35' East 23.00 feet; thence North 37° 20' East 100.00 feet; thence North 32° 15' East 50.00 feet; thence North 78° 25' East 80.00 feet; thence South 75° 45' East 23.00 feet; thence North 65° 00' East 41.00 feet; thence North 39° 30' East 35.00 feet; thence North 33° 40' East 153.00

feet; thence North 47° 45' East 62.00 feet; thence South 72° 15' East 39.00 feet; thence South 32° 25' East 83.00 feet; thence South 50° 40' East 52.00 feet; thence South 88° 36' East 96.00 feet; thence North 77° 45' East 79.00 feet to an angle in the Southwestern boundary of Southern Pacific Transportation Company as said boundary is shown on map entitled "Record of Survey of the Lands of Southern Pacific Transportation Co. through the lands of the Aptos Seascape Corp." filed in Volume 53 of Maps at Page 18, Santa Cruz County Records; thence along said last mentioned boundary South 25° 51' 40" East 195.00 feet; thence South 53° 31' East 168.10 feet; thence leaving said last mentioned boundary South 46° 35' West 80.51 feet; thence South 50° 00' West 80.00 feet; thence South 38° 10' West 128.00 feet; thence South 52° 40' West 118.00 feet; thence South 58° 50' West 83.00 feet; thence South 32° 55' West 26.00 feet; thence South 2° 55' East 30.00 feet; thence South 26° 25' West 27.00 feet; thence South 26° 10' East 80.00 feet; thence South 33°

00' East 59.00 feet; thence South 60° 40' East 50.00 feet thence South 75° 25' East 92.00 feet; thence South 65° 10' East 130.00 feet; thence North 81° 00' East 70.00 feet; thence North 60° 50' East 134.00 feet; thence North 54° 30' East 100.00 feet; thence North 60° 00' East 89.00 feet; thence North 58° 40' East 85.00 feet to an angle in the Southwestern boundary of said lands of Southern Pacific Transportation Company; thence along said last mentioned boundary as shown on said map South 18° 58' 30" East 110.00 feet; thence South 64° 33' East 110.00 feet; thence South 40° 44' East 170.00 feet; thence leaving said last mentioned boundary South 78° 45' West 112.00 feet; thence North 89° 30' West 109.00 feet; thence South 69° 15' West 75.00 feet; thence South 78° 20' West 70.00 feet; thence South 45° 10' West 47.00 feet; thence South 16° 30' West 57.46 feet; thence South 31° 40' East 30.00 feet; thence South 50° 40' East 46.00 feet; thence South 62° 30' East 80.00 feet; thence South 56° 15' East 215.00 feet; thence South 54° 20'

East 125.00 feet; thence South 80° 30' East 60.00 feet; thence North 78° 00' East 177.00 feet; thence South 82° 15' East 52.00 feet; thence South 36° 15' East 52.00 feet; thence South 5° 30' East 36.00 feet; thence South 31° 00' West 32.00 feet; thence South 75° 30' West 80.00 feet; thence South 55° 45' West 58.00 feet; thence South 45° 00' West 190.00 feet; thence North 88° 50' West 30.00 feet; thence North 29°50' West 102.00 feet; thence North 41° 15' West 80.00 feet; thence North 56° 30' West 63.00 feet; thence North 68° 00' West 198.00 feet; thence North 73° 45' West 155.00 feet; thence South 31° 27' West 43.70 feet; thence South 35° 00' East 50.00 feet; thence South 46° 30' East 52.00 feet; thence South 38° 30' East 109.00 feet; thence South 49° 10' East 30.00 feet; thence South 38° 40' East 45.00 feet; thence South 21° 00' East 35.00 feet; thence South 7° 30' East 20.00 feet; thence South 38° 30' East 30.00 feet; thence South 55° 40' East 30.00 feet; thence South 50° 00' East 88.00 feet; thence South 39° 30' East 186.00 feet; thence

South 44° 45' East 32.00 feet; thence South 28° 00' East 35.00 feet; thence South 65° 25' East 48.00 feet; thence South 25° 30' East 25.00 feet; thence South 19° 00' West 18.00 feet; thence South 41° 15' East 100.00 feet; thence South 47° 45' East 47.00 feet; thence South 36° 00' East 80.00 feet; thence South 26° 00' East 70.00 feet; thence South 15° 40' East 30.00 feet; thence South 47° 10' East 94.00 feet; thence South 33° 30' East 60.00 feet; thence South 29° 30' East 140.00 feet; thence South 73° 30' East 6.00 feet; thence North 24° 10' East 70.00 feet; thence North 46° 50' East 140.00 feet; thence South 77° 40' East 25.00 feet; thence South 14° 00' East 58.00 feet; thence South 32° 40' East 35.00 feet; thence South 35° 10' West 28.00 feet; thence South 57° 30' East 22.00 feet; thence South 22° 15' East 30.00 feet; thence South 30° 45' West 51.00 feet; thence South 81° 15' West 40.00 feet; thence South 19° 50' East 21.00 feet; thence East 25.00 feet; thence South 60° 40' East 20.00 feet; thence South 19° 00' East 28.00 feet; thence South 40°

45' East 45.00 feet; thence South 19° 00' East 18.00 feet; thence South 37° 10' West 25.00 feet; thence South 70° 30' West 45.00 feet; thence South 2° 30' East 17.00 feet; thence South 56° 00' East 35.00 feet; thence North 44° 00' East 50.00 feet; thence North 77° 50' East 108.00 feet; thence South 41° 50' East 42.00 feet; thence South 00° 15' West 38.00 feet; thence South 27° 35' West 30.00 feet; thence North 86° 40' East 55.00 feet; thence South 4° 00' East 40.00 feet; thence North 80° 50' East 73.00 feet; thence North 55° 10' East 70.00 feet; thence North 18° 50' East 29.00 feet; thence North 62° 40' East 135.00 feet; thence North 51° 00' East 65.00 feet; thence North 74° 45' East 65.00 feet; thence North 56° 40' East 104.00 feet; thence North 88° 00' East 34.00 feet; thence South 18° 40' East 22.00 feet to the Southeastern boundary of lands described as Parcel Two in Deed from Loretta Veronica Leonard to Aptos Seascape Corporation dated March 28, 1968 and recorded April 1, 1968 in Book 1873 of Official Records at Page 613, Santa Cruz

County Records from which the Eastern corner of said lands bears North 55° 17' 20" East 35.00 feet distant; thence along said Southeastern boundary South 55° 17' 20" West 675.05 feet to a 1 1/2 inch Iron Pipe; thence continuing along said last mentioned boundary South 55° 17' 20" West 410 feet a little more or less to the Bay of Monterey; thence Northwesterly along the Bay of Monterey 4770 feet a little more or less to a station from which the place of beginning bears North 48° 44' 50" East; thence North 48° 44' 50" East 165 feet a little more or less to the place of beginning.

COMPILED DECEMBER 1977 BY WILLIAMS & ASSOCIATES, CONSULTING CIVIL ENGINEERS.

JUDGMENT ENTERED: Jan. 18, 1979

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CRUZ

Case Number
50142

APTOS SEASCAPE CORPORATION,

PLAINTIFF(S)

vs.

COUNTY OF SANTA CRUZ,

Defendants(s)

CERTIFICATE OF MAILING

I, Richard C. Neal, County Clerk and Clerk of the Superior Court of the State of California for the County of Santa Cruz, and not a party to the within action, hereby certify that on January 18, 1979, I served copies of the attached JUDGMENT by depositing the enclosed in sealed envelopes with the postage thereon fully prepaid, in the United States Post Office at Santa Cruz, California, addressed as follows:

Dennis Kehoe, Attorney at Law
323 Church Street
Santa Cruz, CA 95060

Peter Townsend
Garrison, Townsend & Hall
2610 Steuart Tower
One Market Plaza
San Francisco, CA 94105

County Counsel
County of Santa Cruz
Santa Cruz, CA 95060

Dated: 1-18-79

Richard C. Neal, County Clerk and Clerk of the Superior Court, State of California County of Santa Cruz

/s/ Janis R. Hageman
Deputy Clerk

APPENDIX B

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CRUZ

APTOS SEASCAPE CORPORATION, a California corporation,

Plaintiff,

vs.

THE COUNTY OF SANTA CRUZ, BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CRUZ, et al.,

Defendants.

THE COUNTY OF SANTA CRUZ, a body corporate and politic, on behalf of itself, its citizens and the People of the State of California,

Cross-Complainant,

vs.

APTOS SEASCAPE CORPORATION, A California corporation, et al.,

Cross-Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
No. 50142

FILED
JAN 18 1979
By RICHARD C. NEAL, Clerk
Deputy Santa Cruz County

This cause having come on regularly for trial

before the HONORABLE ROLAND K. HALL, Presiding Judge, a jury having been waived, commencing on May 8, 1978, and concluding on July 14, 1978; plaintiff APTOS SEASCAPE CORPORATION being represented by counsel, Adams, Levin, Kehoe, Bosso, Sachs & Bates by DENNIS J. KEHOE and PHILIP R. BATES and Garrison, Townsend and Hall, by PETER L. TOWNSEND; defendants COUNTY OF SANTA CRUZ, BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CRUZ, and PLANNING COMMISSION OF THE COUNTY OF SANTA CRUZ and cross-complainant COUNTY OF SANTA CRUZ on behalf of itself, its citizens and the people of the State of California, being represented by counsel, CLAIR A. CARLSON, County Counsel, JAMES M. RITCHEY, Assistant County Counsel, and JOHN BRISCOE, Special Assistant County Counsel; and

The STATE OF CALIFORNIA and the CALIFORNIA LANDS COMMISSION, as cross-defendants, having been dismissed with prejudice by cross-complainant,

COUNTY OF SANTA CRUZ; and

The Court having taken evidence and heard the testimony and considered same, and, the Court, after plaintiff and defendants had rested their cases on the first amended complaint, at the request of the cross-complainant COUNTY, personally viewed the property which was the subject of the cross-complaint for the purposes of said cross-complaint, in the presence of counsel, the Court Reporter having been excused from being in attendance at said viewing pursuant to the stipulation of the parties; the matter having been argued and briefed and submitted; and the Court having rendered its Memorandum of Intended Decisions; and good cause appearing therefor, the Court now renders the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff owns approximately 110 acres bounded by the Southern Pacific Railroad tracks, Monterey Bay, Camp St. Francis and an existing residential area

which plaintiff developed and sold as Tracts 483 and 511. Approximately 40 acres of the property are above the 100 foot contour line and are herein referred to as the benchlands. The benchlands contain three parcels referred to herein as A, B and C. Approximately 70 acres of the property are below the 100 foot contour line. That 70 acres consists of a beach approximately one mile long, arroyos and palisades. The subject of this action is the 70 acre parcel and it is herein referred to as Subject Property. Subject Property is located in the County of Santa Cruz, State of California and is more fully described in Exhibit "A", attached hereto and incorporated herein.

2. Plaintiff purchased a total of approximately 500 acres. In addition to the 110 acres described above, plaintiff still owns approximately 200 acres of uplands, up the hill and away from the beach. The remaining property has been developed and sold.

3. Before plaintiff purchased the bulk of the property, it was zoned as unclassified. The property

was rezoned as a condition of the purchase. The 110 acre parcel was rezoned residential with a commercial hotel use allowed on Parcel B of the benchlands. The purchase was completed in 1963.

4. On September 26, 1967 the County adopted the Aptos General Plan. A chart marked Exhibit "B" and attached hereto contains the details of the Aptos General Plan as it applies to the 110 acre parcel. Subject Property was designated as beach and palisades, ravines and forest. No residential or other development was allowed on Subject Property.

5. The only reasonable use that can be made of Subject Property is for residential purposes. Subject Property has no agricultural value and is not appropriate for commercial or industrial development.

6. The 1967 Aptos General Plan provided that Subject Property should be left as open space. The problem of taking property by inverse condemnation was considered. The possibility of acquisition for the public was to be investigated. If that was not feasible,

the property owner was to be allowed compensating higher densities (i.e., additional residential units) on upland property. If the owner did not own any other upland property, development on the property designated for open space was to be permitted. The tool proposed to be used to provide compensating higher densities was a planned community district. All of the 110 acres were to be included in this planned community district, as well as other properties. On July 22, 1969 the Board of Supervisors ordered the formation of the planned community district within 90 days. To this day, the planned community district has never been formed and the County has no intention of forming such a district.

7. In 1970 the County began to prepare a Parks, Recreation and Open Space Plan (PROS). The first draft of the plan was completed in 1970. Subject Property was designated "acquisition only - immediate action - low priority." Hearings were held from time to time throughout the development of the PROS

plan. The final draft was completed in 1972 and the plan was adopted as an element of the General Plan in March, 1973. The designation of Subject Property remained the same throughout. It has never been changed.

8. During the early part of 1971 the plaintiff filed an application with the County for a tentative subdivision map for residential development on Subject Property. The subdivision was designated Tract 553, Unit 7. This application prompted the Board of Supervisors to adopt an interim emergency zoning ordinance for the purpose of preventing development of Subject Property until studies could be made of the area. On April 6, 1971, Ordinance 1595 was adopted to accomplish that purpose and the Board of Supervisors ordered the formation of a planned community district within 45 days. Ordinance 1595 was effective for ninety days.

9. On April 14, 1971 the Planning Commission held a hearing on Tract 553, Unit 7. The Planning

Commission found that the subdivision was inconsistent with the Aptos General Plan and denied the application. The Planning Commission considered the fact that the Board of Supervisors had ordered the formation of a planned community district that would include Subject Property. The planned community district would provide the tool to keep Subject Property in open space and provide plaintiff with compensating higher densities elsewhere. Plaintiff appealed the decision of the Planning Commission to the Board of Supervisors. On April 27, 1971 the Board of Supervisors denied the appeal.

10. On July 6, 1971 the Board of Supervisors extended the emergency interim zoning on Subject Property by Ordinance 1617 for an additional three hundred and sixty-five days.

11. On June 27, 1972 the Board of Supervisors extended the emergency interim zoning on Subject Property by Ordinance 1737 for an additional ninety days.

12. On September 19, 1972 the Board of Supervisors extended the emergency interim zoning of Subject Property by Ordinance 1773 for an additional one hundred and twenty days.

13. After the tentative subdivision map for Tract 553, Unit 7 was denied by the County, plaintiff had another development plan for Subject Property prepared. That plan is referred to herein as the Goetz Plan. The Goetz Plan with an environmental impact report was submitted to the County along with a request for rezoning of Subject Property. It was not a formal application for approval of a subdivision. The Goetz Plan provided for all of Subject Property to be left in an open space except for some reverse rise dwelling units about the 70 foot contour level below Parcel C of the benchlands. Planning Department staff felt the plan had merit and recommended that the 110 acres be rezoned as follows (see Exhibit "B"):

1. Subject Property:	UBS-50
2. Parcels A & C:	RM-3000
3. Parcel B:	C-2 (Hotel)

14. The Planning Commission studied the Goetz Plan, held hearings, and concluded that there should be no development at all on the palisades, even above the 70 foot contour. The Planning Commission then recommended the same zoning for the 110 acres as had previously been recommended by staff (see Exhibit "B").

15. The Board of Supervisors held a public hearing and referred the rezoning request back to the Planning Commission to consider R-1-6-PD on the benchlands instead of RM-3000 and C-2 (Hotel). The Planning Commission sent the matter back to the Board of Supervisors without changing its original recommendation for RM-3000 and C-2 (Hotel) on the benchlands.

16. On May 9, 1972 the Board of Supervisors adopted County Ordinance 13.04.306 (now 13.04.426). That ordinance is marked Exhibit "C" and attached hereto. Ordinance 13.04.306 contains the development standards and sets the density allowed in Planned Unit Developments. Subparagraph b provides that the

density in Planned Unit Developments shall not exceed the maximum number of dwelling units allowed by the applicable zoning. The applicable zoning in this case is R-1-6-PD, which allows the construction of single family residences with a maximum density of one site per 6,000 square feet of developable land. There is a provision for a 10% increase on a site of ten acres or more. Subparagraph c provides that the development standards and density requirements for UBS districts shall not be determined by subsections a and b. In UBS districts the development standards and density requirement: must be consistent with the applicable general plan as determined by the Planning Commission, or Board, as the case may be (emphasis added).

17. On December 5, 1972 the Board of Supervisors again considered the rezoning request for the 110 acres. The Board of Supervisors adopted Ordinance 1800 rezoning the 110 acres as follows (see Exhibit "B"):

1. Subject Property: UBS-50

2. Parcels A & C: R-1-6-PD

3. Parcel B: R-1-6-PD

18. During the discussion prior to adopting Ordinance 1800, the Board of Supervisors inquired as to whether any credit could be given for the arroyos and the beach if plaintiffs submitted a Planned Unit Development for the benchlands. The question was directed to Walter Monasch, the Santa Cruz County Planning Director. Mr. Monasch informed the Board of Supervisors that no credit could be given for the arroyos and the beaches that were left in open space. The type (i.e. single family residences) and the density of development of the benchlands are strictly controlled by the R-1-6-PD designation and no density credits can be given on the benchlands in excess of that zoning designation. Shortly thereafter, the Board of Supervisors adopted Ordinance 1800.

19. The effect of Ordinance 1800 is as follows:

1. Subject Property: No development at all

is allowed on Subject Property under Ordinance 1800. The density under the UBS-50 zoning is controlled by the General Plan pursuant to County Ordinance 13.04.306. The density allowed by the Aptos General Plan is zero.

2. Benchlands (A, B, and C): Under the R-1-6-PD zoning, construction of single family residential units is allowed. The maximum density is one site per 6,000 square feet. No compensating higher densities can be granted by the County on the benchlands in return for leaving the 70 acres of Subject Property in open space.

20. On March 27, 1973 the Board of Supervisors adopted the PROS plan as an element of the General Plan. Subject Property was deisgnated as "acquisition only - immediate acquisition - low priority".

21. On October 1, 1974 the Board of Supervisors adopted a new Aptos General Plan. Subject Property

is designated therein as "Open reserve; park-playground". No development of the Subject Property at all is allowed under the 1974 Aptos General Plan.

22. The County of Santa Cruz has precluded all use of Subject Property for residential purposes. Plaintiff has not been allowed any reasonable use of Subject Property. The County has made it impossible to grant compensating higher densities on the benchlands in return for allowing the 70 acres of beach, arroyos and palisades to remain as open space. The County has placed Subject Property into open space and has not, and does not intend to grant the plaintiff any compensating higher densities on the benchlands.

23. The County has not granted plaintiff any open space credits or any other type of credits for Subject Property and does not intend to do so in the future.

24. The effect of UBS-50 zoning, County Ordinance 13.04.306 (see Exhibit "C"), the 1967 Aptos General Plan, the 1974 Aptos General Plan and the 1973 Parks, Recreation and Open Space Plan is to put

the property into open space preserve and preclude all reasonable use of the property by the plaintiff.

25. The County has used subterfuge to acquire Subject Property as open space for the benefit of all the public without compensating plaintiff for its taking of Subject Property in any manner whatsoever.

26. Seascape, in constructing roads and sewers, has expended substantial sums of money in oversizing the sewers and roads so as to service Subject Property.

27. Seascape has been assessed taxes by the County and has paid taxes on Subject Property to the County since Seascape purchased Subject Property to the present date.

28. Subject Property has been treated by the County as a parcel of property separate from the benchlands. Subject Property is a de facto separate parcel of property.

29. A ban on sewer connections in the area in which Subject Property is located has been in effect since July, 1972. It will not be lifted until the Aptos

transmission line to the Santa Cruz sewer plant is completed sometime in 1979. Said sewer ban was temporary and did not prevent County from applying reasonable land use regulations to Subject Property or, in the alternative, granting plaintiff open space credits or residential density credits on other property owned by plaintiff. County placed Subject Property into de facto open space preserve because County wanted the property as open space for use by all members of the public, not because of the temporary sewer ban.

30. County has not previously allowed development on other property owned by plaintiff in excess of the pertinent zoning and Aptos General Plan.

31. Plaintiff has fully exhausted all available administrative remedies. Any additional attempt by plaintiff to petition County for relief would have been a futile gesture.

32. At all times herein mentioned, the County was and is a governmental entity and is possessed with the power of eminent domain and authorized to acquire

private property for public use, including but not limited to parks and open space, by negotiation, condemnation or the exercise of eminent domain.

33. Culminating in the adoption of Ordinance 1800 on December 5, 1972, all of the Subject Property was designated as open space and the County has taken Subject Property to preserve it as open space for the benefit of all the public.

34. The acquisition, maintenance and preservation, and each of them, of land for open space is a public use for which public funds may be expended by County.

35. County has taken Subject Property for the benefit of the public for open space and just compensation is due, owing and payable by County to Seascape.

36. The actions and inactions of the County culminating in Ordinance 1800 adopted December 5, 1972 were invoked by the County in order to evade the requirement that the Subject Property must be

acquired in eminent domain proceedings.

37. By its actions and inactions culminating in Ordinance 1800, the County has preserved the Subject Property for the benefit of the public for open space and park purposes thereby causing a taking of Subject Property for which just compensation is due, owing and payable by County to Seascape

38. There were no market sales within a reasonable time of the date of valuation located sufficiently near the Subject Property being valued that were of the same size or the approximate same size of Subject Property. Nevertheless, there were market sales within a reasonable time of the date of valuation of Subject Property located sufficiently near the Subject Property being valued that were smaller in size than Subject Property that reasonably do shed light upon the fair market value of Subject Property as of the date of valuation. Use of such sales to shed light upon the fair market value of Subject Property as of the date of valuation is a just, reasonable and equitable

method for the determination of the fair market value of Subject Property, as of the date of valuation.

39. No developer's or landowner's profit, present or future, is included in the fair market value of the Subject Property as set forth herein.

40. Subject Property is located within the coastal zone established by the California Coastal Zone Conservation Act of 1972 and, at least in substantial part, within the permit jurisdiction of that Act.

41. Having considered the expert testimony herein, the view of subject property; CEQA; the passage of the California Coastal Zone Conservation Act of 1972; the items and adjustments specified in the Appraisal Handbook published by the American Institute of Real Estate Appraisers, Defendant's Exhibit KK; and other factors relevant to value, it is found that immediately prior to the taking by County of Subject Property, and as of December 5, 1972, Subject Property had a fair market value of $3,150,000. As a proximate result of the taking by

County, of the fee interest of Subject Property, Seascape has been damaged in the amount of $3,150,000, plus interest at the rate of seven percent per annum from December 5, 1972, until paid in full, together with costs of suit; expert fees for Gerald Tucker, H. Rich Bramwell, Byron Cunningham, Robert Williams, the engineering firm of Bowman & Williams, and particularly Tom Williams and Fred J. Werdmuller, and Jo Crosby & Associates; and attorneys' fees for the law firm of Adams, Levin, Kehoe, Bosso, Sachs & Bates, all of which fees and costs have reasonably and actually been incurred by plaintiff. Said fees and costs are reasonable costs, disbursements and expenses, and each of them, of Seascape reasonably and actually incurred because of said inverse condemnation proceeding.

42. The parties hereto have stipulated that the amounts claimed by Seascape with respect to costs of suit, fees and attorneys' fees shall be submitted to the Court in the Memorandum of Costs. The County is

entitled to a Court hearing thereafter if it objects to the amounts in an appropriate Motion to Tax Costs.

43. If developed for residential purposes, Subject Property would reasonably accommodate 200 residential units.

CROSS-COMPLAINT FOR IMPLIED-IN-LAW PUBLIC DEDICATION

44. The real property described in the Cross-Complaint is the same real property described in the Complaint. It consists of beach, arroyos and palisades. Said real property is referred to herein as Subject Property and the beach portion of Subject Property is referred to herein as Subject Beach.

45. Plaintiff is the owner of Subject Property. Subject Property is included within the boundaries of the Aptos and San Andreas Mexican Grants, as surveyed, confirmed, patented, and conveyed by the United States of America to Seascape's predecessor in the title pursuant to the Private Land Claims Act of 1851 (9 Stats. at L. 631).

46. The bayward boundary of the lands so patented by the United States of America and of the land described in the Cross-Complaint is the mean high tide line of Monterey Bay.

47. The patents of the United States of America to Seascape's predecessors did confirm and convey fee simple absolute title to the lands therein described, including Subject Property.

48. Subject Beach is approximately one mile long and is bounded by Monterey Bay in front and palisades and Tract 511 in back. Subject Beach is part of a continuous beach approximately 15 miles long, stretching from Capitola to the mouth of the Pajaro River. It is bounded by private beaches at both ends. On the northwest end or up the beach, it is bounded by Tract 483 and Hidden Beach. The beach in front of Tract 483 is now owned by the lot owners in that subdivision and is not part of this action. Rio del Mar Beach State Park and Seacliff Beach State Park are located farther up the beach from Subject Beach. On the southeast

end or down the beach, it is bounded by Camp St. Francis. La Selva Beach and Manresa Beach State Park are located farther down the beach from Subject Beach.

49. There are five access routes to Subject Beach. Busch's Gulch is located northwest of Subject Beach. The sewer plant is located in Busch's Gulch. It is separated from Subject Beach by Tracts 483 and 511. Busch's Gulch can be reached by taking Rio del Mar Boulevard to Townsend Drive or Cliff Drive. A footpath leads through Busch's Gulch to Hidden Beach. With the development of Seascape property, an additional access was created to Busch's Gulch. Clubhouse Drive to Sumner Avenue was completed in 1968. Sumner Avenue from Clubhouse Drive to Busch's Gulch was completed in 1973. Since 1973, Busch's Gulch can be reached by way of Clubhouse Drive and Sumner Avenue. Busch's Gulch is referred to herein as Access No. 1.

50. Via Palo Alto in Tract 511 was completed in 1970. Since then motor vehicles can take Clubhouse Drive to Via Palo Alto A stairway leads from Via Palo Alto to the beach. The stairway was also completed in 1970. The Via Palo Alto stairway is referred to herein as Access No. 2.

51. Seascape Boulevard, Dolphin Drive and Sumner Avenue between Seascape Boulevard and Clubhouse Drive were completed in 1965. Since 1965 motor vehicles can take Seascape Boulevard or Seascape Boulevard and Dolphin Drive to Sumner Avenue. A footpath leads from the Southern Pacific railroad trestle near the intersection of Dolphin Drive and Sumner Avenue through an arroyo to Subject Beach. Until February, 1976 this footpath was unimproved, steep and difficult. It is referred to herein as Access No. 3.

52. Another footpath begins at the intersection of Seascape Boulevard and Sumner Avenue. It leads across a field and down a palisade to Subject Beach.

This footpath was and is unimproved, steep and difficult. It is referred to herein as Access No. 4.

53. Sumner Avenue was extended from Seascape Boulevard to Via Lantana and Via Trinita in 1973. A footpath leads from that area through an arroyo to Subject Beach. Until September, 1975 this footpath was unimproved, steep and difficult. It is referred to herein as Access No. 5.

54. No public parking is provided for any of these access routes except on the streets.

55. Until the development of Seascape property, the only motor vehicle access was to Busch's Gulch (Access No. 1). The footpath through Busch's Gulch leads to the Hidden Beach area. People using that access tended to congregate in the Hidden Beach area. People seeking privacy could walk up the beach toward Rio del Mar or down the beach to the area in front of what is now Tract 483. Only a few people walked past what is now Tract 483 to Subject Beach. Those who did either wanted privacy and seclusion or

were following the clams or surf fish.

56. The paved portion of Clubhouse Drive ended on the landward side of the golf course and did not reach what is now known as Sumner Avenue. A dirt road did cross the golf course ending at a house located in Busch's Gulch. That road was not open to the public. A few people who lived in the area walked across the golf course and either climbed down through an arroyo to the beach or crossed the strawberry fields on top of the palisades and climbed down to Subject Beach. These routes were unimproved, steep and difficult. Those desiring an easier route would walk to Busch's Gulch (Access No. 1).

57. People could also walk up the beach from La Selva Beach and Manresa Beach State Park or down the beach from Rio del Mar. It is a long walk either way and few people made the trip.

58. Until the development of Seascape Property opened up better access to Subject Beach, public use of Subject Beach was casual rather than substantial.

59. The first access routes that were available due to the development of Seascape were Nos. 3 and 4. Seascape Boulevard, Dolphin Drive and Sumner Avenue from Clubhouse Drive to Dolphin Drive and Seascape Boulevard were completed in 1965. There was an increase in the amount of public use. Public use was still casual rather than substantial.

60. In 1968, Clubhouse Drive was completed to Sumner Avenue and Access Nos. 3 and 4. Public use gradually increased but in 1968 it was still casual rather than substantial.

61. The stairs constructed by Seascape from Via Palo Alto to Subject Beach (Access No. 2) were completed in 1970. Although parking on the street is a limiting factor, the stairway does provide easy access to the beach. Since the stairs were completed in 1970, public use of Subject Beach has increased substantially. People tend to congregate in that area.

62. Sumner Avenue was extended to Busch's Gulch (Access No. 1) and to Access No. 5 in 1973. Use of

Subject Beach has increased very substantially since 1973.

63. On October 25, 1962 Erik Krag, predecessor in title of the plaintiff, dedicated Access No. 1 to the public.

64. On May 22, 1969 plaintiff dedicated Access No. 2 to the public.

65. On October 15, 1976 plaintiff dedicated Access No. 3 to the public.

66. In September of 1975 plaintiff improved Access No. 5, including the construction of a stairway over the steeper parts.

67. In February of 1976 plaintiff improved Access No. 3, including the construction of a stairway over the steeper parts.

68. There are not now nor have there ever been any public improvements on or public maintenance of Subject Beach. The only improvements are those made to Access Nos. 3 and 5 mentioned above. They were made by plaintiff. There are a small number of trash

cans located on Subject Beach near the palisades. They are provided and maintained by plaintiff. No public entity has ever provided any trash cans or other items for Subject Beach. There are not now nor have there ever been any rest rooms, lifeguards or other such amenities.

69. In 1964, plaintiff began hiring off duty deputy sheriffs for security purposes. Beginning in 1969, plaintiff hired its own security patrol. Maintaining order on Subject Beach was one of the functions of security personnel since 1964.

70. Access Nos. 1, 2 and 3 have already been dedicated to the public and are not in issue.

71. The public was granted permission to use Subject Beach pursuant to Civil Code Section 813 on July 31, 1972. Public use of Subject Beach after that date does not create any public rights. Plaintiff contends that the permission granted July 31, 1972 to the public to use Subject Beach impliedly granted the public permission to use Access Nos. 4 and 5 to reach

the beach from Sumner Avenue. That contention is valid. Public use of Access Nos. 4 and 5 after July 31, 1972 does not create any public rights.

72. The public was formally granted permission to use Access Nos. 4 and 5 pursuant to Civil Code Section 813 on July 15, 1976.

73. Prior to the development of Seascape properties, Subject Beach was a remote, secluded, isolated beach with limited access. The main access was through Busch's Gulch (Access No. 1) which was dedicated to the public on October 25, 1962. People who used that access tended to congregate in the area of Hidden Beach. The few people who walked down the beach to Subject Beach were looking for the privacy, isolation and seclusion available on Subject Beach or were following the clams or fish.

74. Those people who used the area of Subject Beach for clamming or fishing generally, though not exclusively, used the beach below the mean high tide line. That area did not and does not belong to the

plaintiff. Use of that area by the public does not create any public rights over property above the mean high tide line.

75. Until the development of Seascape Property, public use of Subject Beach was casual rather than substantial. Subject Beach was a remote, secluded and isolated beach.

76. In 1965 streets were completed to the entrance of Access Nos. 3 and 4. These access routes were unimproved, steep and difficult. Access No. 3 was improved by plaintiff and a stairway added in February of 1976. It was dedicated to the public on October 15, 1976. Access No. 4 remains unimproved, steep and difficult to this day.

77. In 1968, an additional street access was completed to Access Nos. 3 and 4.

78. In 1970, Access No. 2 and the streets leading to it were completed by plaintiff. It had previously been dedicated to the public on May 22, 1969.

79. In 1973, streets were completed to Access No. 5. Access No. 5 was unimproved, steep and difficult. It was improved by the plaintiff and a stairway was added in September of 1975. An additional street access to Busch's Gulch (Access No. 1) was also completed in 1973.

80. The five-year period prior to July 31, 1972 began July 31, 1967. At that time the only access routes that could be approached by motor vehicle were Busch's Gulch (Access No. 1) and Access Nos. 3 and 4. Busch's Gulch could only be reached through the Rio del Mar flats and then by Townsend Drive or Cliff Drive. Access Nos. 3 and 4 could only be reached by taking San Andreas Road to Seascape Boulevard to Sumner Avenue with Dolphin Drive as an alternate route off of Seascape Boulevard. Neither Access No. 1 nor Access Nos. 3 and 4 contained any place for public parking except on the street. Access Nos. 3 and 4 remained unimproved, steep and difficult. A few people living in the area would walk to Subject Beach

from their homes. The use of Subject Beach at this time was casual rather than substantial. Subject Beach was still secluded, remote and isolated.

81. Public use of Subject Beach increased gradually from 1965 to the present. It is impossible to pick a precise date and state with any degree of accuracy that public use changed from casual to substantial on that particular day. Public use did change from casual to substantial sometime between the completion of Access No. 2 in 1970, and the completion of Sumner Avenue to Access No. 5 in 1973.

82. Public use of Subject Beach was not substantial for any five year period prior to July 31, 1972. Public use during the immediately preceding five year period was not sufficient to raise the conclusive and indisputable presumption of knowledge and acquiescence in public use which, at the same time, negated the idea of mere license. The use was casual rather than substantial. The scope and continuity of the use were not enough to clearly indicate to the owner that

the property was in danger of being dedicated.

83. COMMENT: County has requested a finding of fact that the water in Monterey Bay reaches the base of the palisades in severe winter storms. No such finding of fact is included because it could only be relevant to an attempt to establish an ordinary high-water mark. Since no evidence was introduced as to how often water from Monterey Bay reaches the base of the palisades, the evidence was insufficient to establish the ordinary high-water mark. Also, the "ordinary high-water mark" referred to in Civil Code Section 830 has the same definitive meaning as "mean high tide line". The "mean high tide line" is a phrase commonly used in surveying and the meaning of the phrase commonly used in surveying is the meaning adopted by this Court.

84. COMMENT: County has requested a finding of fact as to the number of people using Subject Beach at various times. The evidence introduced was insufficient to make such a finding. Subject Beach

terminates at the "mean high tide line" and people seaward of that line are not on Subject Beach. Hidden Beach and the beach in front of Tract 483 are not included in Subject Beach. No reliable testimony was introduced from which this Court could make an accurate approximation of the number of people using Subject Beach at a particular time.

85. Any Conclusion of Law more properly designated as a Finding of Fact is incorporated herein as a Finding of Fact.

CONCLUSIONS OF LAW

1. By the actions and inactions of the County, culminating in the adoption of Ordinance 1800 adopted December 5, 1972, Seascape has been deprived of all reasonable, practicable, beneficial and economic use, and each of them, of Subject Property by County for which just compensation is due, owing and payable by County to Seascape.

2. On December 5, 1972, the County caused and accomplished a de facto taking of the Subject Property

entitling Seascape to judgment in inverse condemnation for said taking.

3. Defendants, County of Santa Cruz, Board of Supervisors of the County of Santa Cruz, and the Planning Commission of the County of Santa Cruz, are existent pursuant to the laws of the State of California as a general law county.

4. The use for which the Subject Property was taken by the County is a public use for which the expenditure of public funds is authorized by law and the acquisition of the same is necessary for such use.

5. Seascape duly and timely submitted a claim with County which claim was denied and, thereafter, Seascape duly and timely commenced this inverse condemnation proceeding.

6. Seascape is entitled to judgment against the County of Santa Cruz for just compensation for said taking as measured by the fair market value of Subject Property as of December 5, 1972.

7. Seascape is entitled to judgment against defendants, and each of them, in the amount of $3,150,000.00, together with interest thereon at the rate of seven percent per annum from December 5, 1972, until paid in full, together with costs of suit herein, attorneys' fees and expert.fees in the inverse condemnation proceedings herein.

8. Seascape is entitled to costs of suit, attorneys' fees and expert fees for Gerald Tucker, H. Rich Bramwell, Byron Cunningham, Robert Williams, the engineering firm of Bowman & Williams and in particular Tom Williams and Fred J. Werdmuller, Jo Crosby & Associates, and judgment therefor.

9. This Court determined on August 18, 1978, upon motion of County, that Count II of the First Amended Complaint failed to state a cause of action. The zoning enactments of the County were a valid exercise of the police power to zone, and beyond constitutional attack except in proceedings for damages in inverse condemnation. County is therefore

entitled to judgment dismissing Count II of the First Amended Complaint.

10. The Cross-Complaint was filed within a reasonable time after the County discovered the possibility of a claim of implied dedication and the action is not barred by laches or estoppel.

11. Seascape was, on the date of said taking, the owner of the real property described in the Cross-Complaint in fee simple absolute. The seaward boundary is the "mean high tide line". No easement acquired under Mexican law affects the seaward boundary. That boundary is determined by Civil Code Section 830. The patent in question does not indicate a different intent.

12. There has been no dedication to the public of the land described in the Cross-Complaint, or any interest therein, at any time, except for those express written dedications and grants of easements and rights of way set forth in the Official Records of the County of Santa Cruz.

13. On the date of said taking there were no public easements or other public rights of use of the land described in the Cross-Complaint except for those express written dedications and grantes of easements and rights of way set forth in the Official Records of Santa Cruz County.

14. Any Finding of Fact more properly designated as a Conclusion of Law is incorporated herein as a Conclusion of Law.

Dated: January 17, 1979

/s/ ROLAND K. HALL

ROLAND K. HALL

JUDGE OF THE SUPERIOR COURT

EXHIBIT A

SITUATE IN THE COUNTY OF SANTA CRUZ, STATE OF CALIFORNIA

BEING a part of the Aptos and San Andreas Ranchos and more particularly bounded and described as follows, to wit:

BEGINNING at the Southern corner of Lot 1 as said lot is shown on map entitled "Seascape Beach Estates Tract 483, Unit One" filed in Volume 48 of Maps at Page 43, Santa Cruz County Records.

THENCE FROM SAID POINT OF BEGINNING along the Southeastern boundary of said Tract 483 North 48° 44' 50" East 245.00 feet to the Southern corner of Lot 6 as said lot is shown on Map entitled "Seascape Beach Estates Tract 511, Unit Four" filed in Volume 50 of Maps at Page 283, Santa Cruz County

Records. Thence along the Southeastern boundary of said Lot 6 North 61° 16' 08" East 25.91 feet to the Western corner of Lot 7 in said Tract 511; thence along the Southwestern boundary of said Tract 511, South 41° 15' 10" East 871.62 feet to the Southern corner of Lot 19 in said tract; thence along the Southeastern boundary of said Tract 511 North 48° 44' 50" East 84.44 feet; thence leaving said last mentioned boundary South 54° 15' East 50.35 feet; thence North 80° 35' East 45.00 feet; thence South 29° 00' East 26.00 feet; thence South 52° 20' West 30.00 feet; thence South 29° 20' East 32.00 feet; thence South 42° 35' East 39.00 feet; thence South 48° 30' East 102.00 feet; thence South 16° 00' East 58.00 feet; thence South 29° 00' East 70.00 feet thence North 82° 00' East 15.00 feet; thence North 57° 35' East 23.00 feet; thence North 37° 20' East 100.00 feet; thence North 32° 15' East 50.00 feet; thence North 78° 25' East 80.00 feet; thence South 75° 45' East 23.00 feet; thence North 65° 00' East 41.00 feet; thence North 39°

30' East 35.00 feet; thence North 33° 40' East 153.00 feet; thence North 47° 45' East 62.00 feet; thence South 72° 15' East 39.00 feet; thence South 32° 25' East 83.00 feet; thence South 50° 40' East 52.00 feet; thence South 88° 36' East 96.00 feet; thence North 77° 45' East 79.00 feet to an angle in the Southwestern boundary of Southern Pacific Transportation Company as said boundary is shown on map entitled "Record of Survey of the Lands of Southern Pacific Transportation Co. through the lands of the Aptos Seascape Corp." filed in Volume 53 of Maps at Page 18, Santa Cruz County Records; thence along said last mentioned boundary South 25° 51' 40" East 195.00 feet; thence South 53° 31' East 168.10 feet; thence leaving said last mentioned boundary South 46° 35' West 80.51 feet; thence South 50° 00' West 80.00 feet; thence South 38° 10' West 128.00 feet; thence South 52° 40' West 118.00 feet; thence South 58° 50' West 83.00 feet; thence South 32° 55' West 26.00 feet; thence South 2° 55' East 30.00 feet; thence South 26° 25' West 27.00 feet;

thence South 26° 10' East 80.00 feet; thence South 33° 00' East 59.00 feet; thence South 60° 40' East 50.00 feet thence South 75° 25' East 92.00 feet; thence South 65° 10' East 130.00 feet; thence North 81° 00' East 70.00 feet; thence North 60° 50' East 134.00 feet; thence North 54° 30' East 100.00 feet; thence North 60° 00' East 89.00 feet; thence North 58° 40' East 85.00 feet to an angle in the Southwestern boundary of said lands of Southern Pacific Transportation Company; thence along said last mentioned boundary as shown on said map South 18° 58' 30" East 110.00 feet; thence South 64° 33' East 110.00 feet; thence South 40° 44' East 170.00 feet; thence leaving said last mentioned boundary South 78° 45' West 112.00 feet; thence North 89° 30' West 109.00 feet; thence South 69° 15' West 75.00 feet; thence South 78° 20' West 70.00 feet; thence South 45° 10' West 47.00 feet; thence South 16° 30' West 57.46 feet; thence South 31° 40' East 30.00 feet; thence South 50° 40' East 46.00 feet; thence South 62° 30' East 80.00 feet; thence

South 56° 15' East 215.00 feet; thence South 54° 20' East 125.00 feet; thence South 80° 30' East 60.00 feet; thence North 78° 00' East 177.00 feet; thence South 82° 15' East 52.00 feet; thence South 36° 15' East 52.00 feet; thence South 5° 30' East 36.00 feet; thence South 31° 00' West 32.00 feet; thence South 75° 30' West 80.00 feet; thence South 55° 45' West 58.00 feet; thence South 45° 00' West 190.00 feet; thence North 88° 50' West 30.00 feet; thence North 29°50' West 102.00 feet; thence North 41° 15' West 80.00 feet; thence North 56° 30' West 63.00 feet; thence North 68° 00' West 198.00 feet; thence North 73° 45' West 155.00 feet; thence South 31° 27' West 43.70 feet; thence South 35° 00' East 50.00 feet; thence South 46° 30' East 52.00 feet; thence South 38° 30' East 109.00 feet; thence South 49° 10' East 30.00 feet; thence South 38° 40' East 45.00 feet; thence South 21° 00' East 35.00 feet; thence South 7° 30' East 20.00 feet; thence South 38° 30' East 30.00 feet; thence South 55° 40' East 30.00 feet; thence South 50° 00' East 88.00

feet; thence South 39° 30' East 186.00 feet; thence South 44° 45' East 32.00 feet; thence South 28° 00' East 35.00 feet; thence South 65° 25' East 48.00 feet; thence South 25° 30' East 25.00 feet; thence South 19° 00' West 18.00 feet; thence South 41° 15' East 100.00 feet; thence South 47° 45' East 47.00 feet; thence South 36° 00' East 80.00 feet; thence South 26° 00' East 70.00 feet; thence South 15° 40' East 30.00 feet; thence South 47° 10' East 94.00 feet; thence South 33° 30' East 60.00 feet; thence South 29° 30' East 140.00 feet; thence South 73° 30' East 6.00 feet; thence North 24° 10' East 70.00 feet; thence North 46° 50' East 140.00 feet; thence South 77° 40' East 25.00 feet; thence South 14° 00' East 58.00 feet; thence South 32° 40' East 35.00 feet; thence South 35° 10' West 28.00 feet; thence South 57° 30' East 22.00 feet; thence South 22° 15' East 30.00 feet; thence South 30° 45' West 51.00 feet; thence South 81° 15' West 40.00 feet; thence South 19° 50' East 21.00 feet; thence East 25.00 feet; thence South 60° 40' East 20.00 feet;

thence South 19° 00' East 28.00 feet; thence South 40° 45' East 45.00 feet; thence South 19° 00' East 18.00 feet; thence South 37° 10' West 25.00 feet; thence South 70° 30' West 45.00 feet; thence South 2° 30' East 17.00 feet; thence South 56° 00' East 35.00 feet; thence North 44° 00' East 50.00 feet; thence North 77° 50' East 108.00 feet; thence South 41° 50' East 42.00 feet; thence South 00° 15' West 38.00 feet; thence South 27° 35' West 30.00 feet; thence North 86° 40' East 55.00 feet; thence South 4° 00' East 40.00 feet; thence North 80° 50' East 73.00 feet; thence North 55° 10' East 70.00 feet; thence North 18° 50' East 29.00 feet; thence North 62° 40' East 135.00 feet; thence North 51° 00' East 65.00 feet; thence North 74° 45' East 65.00 feet; thence North 56° 40' East 104.00 feet; thence North 88° 00' East 34.00 feet; thence South 18° 40' East 22.00 feet to the Southeastern boundary of lands described as Parcel Two in Deed from Loretta Veronica Leonard to Aptos Seascape Corporation dated March 28, 1968 and recorded April 1, 1968 in Book

1873 of Official Records at Page 613, Santa Cruz County Records from which the Eastern corner of said lands bears North 55° 17' 20" East 35.00 feet distant; thence along said Southeastern boundary South 55° 17' 20" West 675.05 feet to a 1 1/2 inch Iron Pipe; thence continuing along said last mentioned boundary South 55° 17' 20" West 410 feet a little more or less to the Bay of Monterey; thence Northwesterly along the Bay of Monterey 4770 feet a little more or less to a station from which the place of beginning bears North 48° 44' 50" East; thence North 48° 44' 50" East 165 feet a little more or less to the place of beginning.

COMPILED DECEMBER 1977 BY WILLIAMS & ASSOCIATES, CONSULTING CIVIL ENGINEERS.

EXHIBIT B

	1967 Aptos General Plan *	Staff and Planning Commission Recommendations 1972	Ord. 1800 12-5-72
SUBJECT PROPERTY	Beaches and Palisades Ravines and Forests	UBS-50	UBS-50
BENCHLANDS A & C	Residential Medium Density Max.6 Units per acre	RM-3000	R-1-6-PD
BENCHLANDS B	Residential Medium High Density Max. 8 Units per Acre Alternate Use - Hotel	C-2 (Hotel)	R-1-6-PD

* Two parks are located somewhere within the 110 acres. Parcels A & C. However, the map could be interpreted each of the parks is contained in Subject Property.

EXHIBIT B

ons	Ord. 1800 12-5-72	PROS Mar. 1973	1974 Aptos General Plan
	UBS-50	Acquisition only Immediate Low Priority	Open Reserve and Park Playground
	R-1-6-PD	Not Applicable	Urban Max. 6 Units per Acre
)	R-1-6-PD	Not Applicable	Urban Max. 6 Units per Acre

the 110 acres. They appear to be located in
be interpreted as providing that part of
ect Property.

B-48.

EXHIBIT C

13.04.306 Planned Unit Development Site Area - Development Standards - Density.

a. Development Standards. Development standards for site area and dimensions, site coverage, yard spaces, heights of structure, distances between structures, off-street parking and off-street loading facilities and landscaped areas shall, in the aggregate, be at least equivalent to the standards prescribed by the regulations for the district in which the planned unit development is located.

b. Density. The average number of dwelling units per developable acre shall not exceed the maximum number of dwelling units prescribed by the site regulations or the site area per dwelling unit regulation for the

district in which the planned unit development is located subject, however, to the exception that the average number of dwelling units per developable acre may exceed the maximum number of dwelling units prescribed for a district by not more than 10% in a planned unit development on a site of ten acres or more.

c. Exception. The development standards and density requirements of subsections (a) and (b) above shall not apply in the "U-BS" Districts wherein the standards and density must be consistent with the applicable General Plan as determined by the Planning Commission or Board, as the case may be. (Ord. 1714, Sec. 2, May 9, 1972).

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CRUZ

Case Number
50142

APTOS SEASCAPE CORPORATION,

PLAINTIFF(S)

vs.

COUNTY OF SANTA CRUZ,

Defendants(s)

CERTIFICATE OF MAILING

I, Richard C. Neal, County Clerk and Clerk of the Superior Court of the State of California for the County of Santa Cruz, and not a party to the within action, hereby certify that on January 18, 1979, I served copies of the attached JUDGMENT by depositing the enclosed in sealed envelopes with the postage thereon fully prepaid, in the United States Post Office at Santa Cruz, California, addressed as follows:

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Dated: 1-18-79

Richard C. Neal, County Clerk and Clerk of the Superior Court, State of California County of Santa Cruz

/s/ Janis R. Hageman
Deputy Clerk

APPENDIX C

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

APTOS SEASCAPE CORPORATION,

Plaintiff, Cross-defendant
and Appellant,

v.

THE COUNTY OF SANTA CRUZ et al.,

Defendants, Cross-complainants
and Appellants.

A012759
1 Civ. No. 46963
(Super. Ct. No. 50142)

FILED
DEC 23 1982
Court of Appeal - First Dist.
By: CLIFFORD C. PORTER, Clerk
Deputy

The County of Santa Cruz (County) and others appeal from a judgment in an inverse condemnation action awarding Aptos Seascape Corporation

(Seascape), a California corporation, over $3,000,000. The County also appeals from an adverse judgment on its cross-complaint, which alleged an implied dedication to the public of certain of Seascape's beach property.

The Facts

Seascape owns approximately 110 acres of real property in Stanta Cruz County, bounded by the Southern Pacific Railroad tracks, Monterey Bay, Camp St. Francis, and an existing residential tract.[1/] The 110 acres include approximately 40 acres which are above the 100 foot contour line (the "benchlands"), and approximately 70 acres below that contour line. The 70 acres include a beach about a mile long, arroyos, and a line of cliffs, or palisades. It is the 70 acres which are at issue here, and they will be referred to as

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1/ The 110 acres are part of 500 acres which Seascape purchased in 1963. In addition to the 110 acres, Seascape still owns approximately 200 acres of "uplands," up the hill and away from the beach; it has developed and sold about 190 acres.

the "Subject Property." The benchlands include three parcels, designated parcels A, B, and C. Before the property was purchased, it was zoned unclassified. As a condition of its purchase, it was rezoned; the 110 acres were zoned residential, with a commercial hotel use allowed on one section of the benchlands.

In 1967 the County adopted the Aptos General Plan (Plan), which indicated that the subject property should remain as open space, or beach and palisades, ravines and forests. According to the Plan, benchlands parcels A and C would be zoned medium density residential (maximum 6 units per acre), and parcel B, medium high density residential (maximum 8 units per acre), with a hotel as an alternate use. The Plan also stated that although development on beaches should be prohibited, compensating higher densities should be permitted on other portions of property in the same ownership. The Plan proposed formation of a new planned community district in the area in part to implement the award of compensating densities. No

such district has ever been formed.

In March 1971 Seascape submitted a tentative subdivision map for the 110-acre parcel. In response, the board of supervisors enacted an interim emergency zoning ordinance to preclude Seascape from further processing any land use proposals until the County completed its study of the area. The application for the map was denied as inconsistent with the Plan. The interim zoning ordinance was extended three times.

Seascape submitted no other formal map or subdivision applications. It did, however, informally submit a development proposal to the planning commission. Although the commission took no action on that plan, it recommended to the board of supervisors a rezoning which would in effect have prohibited development on the subject property, but which would have increased the density recommended by the Plan for benchlands parcels A and C, and allowed a hotel on parcel C.

The County rejected that recommendation. In December 1972 it adopted ordinance 1800, zoning the subject property as U-BS, (unclassified - special building site area regulations) and the benchlands R-1-6-PD (one family residence - planned development district: 6,000 sq. ft. minimum site area).

On March 27, 1973, the County board adopted a Parks, Recreation and Open Space Plan (PROS), which designated the subject property as "acquisition only - immediate action - low priority." In 1974 the County adopted a new Aptos General Plan, in which the property is designated as "Open reserve; park-playground."

In June 1973 Seascape filed a first amended complaint for damages, inverse condemnation and declaratory relief against the County, and others. Seascape alleged that by rezoning, the County deprived it of all reasonable use of certain of its real property, in effect taking that property without paying just compensation. Seascape sought damages of $23,000,000 for the property allegedly taken, $12,000,000 for severance

damage to adjacent property, and a declaration invalidating the zoning ordinance. The County cross-complainted for declaratory and injunctive relief, alleging that a part of Seascape's property had been impliedly dedicated to the public.

Court trial was held in November 1977. Among its findings, the court found: (1) the Subject Property has always been treated by the County as a parcel separate from the benchlands, and is a "de facto separate parcel"; (2) the only reasonable use that can be made of the Subject Property is for residential purposes; (3) the effect of ordinance 1800 is to allow no development at all on the Subject Property, and to allow a maximum density of one site per 6,000 square feet on the benchlands, with no compensating higher densities permitted; (4) the County does not intend to grant Seascape any compensating higher densities on the benchlands in the future; (5) the County has precluded all reasonable use of the Subject Property and has therefore taken the property to preserve it as open

space; (6) Seascape has fully exhausted all available administrative remedies, and any additional attempt to petition the County for relief would be futile; (7) just compensation in the amount of $3,150,000 (the fair market value of the Subject Property as of December 5, 1972) is due and owing to Seascape.[2/]

The court ordered entry of an alternative judgment. As an alternate means of compensation, and in lieu of payment of damages, the judgment granted Seascape compensating higher densities of 40 residential units on its benchlands and 160 residential units on its uplands, "in addition to any other uses and densities that the benchlands and uplands ... may otherwise yield, which underlying uses and densities are herein referred to as 'Base Densities.' Said Base Densities shall be reasonable and shall not be reduced for the purpose of avoiding the effect of this Judgment." Upon

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2/ The facts and the court's findings with respect to the cross-complaint will be set forth in conjunction with the discussion of that complaint.

issuance of building permits by the County and substantial construction by Seascape, Seascape was to convey an open-space easement in perpetuity for the subject property to the County. If Seascape had not received all of the compensating higher densities called for within five years from the date of entry of the judgment, it was to be paid the full damage award. If it had received some but not all of those compensating densities, it was to be paid $15,750 for each unit not received within the five-year period. This alternative was at the option of the County, which was to (1) file a written notice of acceptance within 60 days of the date of the filing of the entry of judgment, accompanied by a resolution of the board authorizing acceptance, and (2) enact enabling ordinances within that time period. The alternate was void if not exercised. The County did not elect the alternative, and instead appealed from the judgment.

Seascape's Complaint[3/]

I

In March 1979, two months after judgment was entered in this case, the California Supreme Court held that a landowner who alleges that a zoning ordinance has deprived him of substantially all use of his land, in violation of the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 19 of the California Constitution, may attempt to invalidate the ordinance as excessive regulation through declaratory relief or mandamus, but may not sue in inverse condemnation for damages. (Agins v. City of Tiburon (1979) 24 Cal.3d 266, 273, affd. on another ground, Agins v. Tiburon (1980) 447 U.S. 255.)

The County first argues that in light of Agins, the judgment awarding damages must be reversed.

3/ The California Coastal Commission has filed an amicus curiae brief on behalf of the County in its appeal from the judgment on the complaint.

Seascape contends that Agins is inapplicable because its discussion of the availability of inverse condemnation was dictum, which has "evaporated" with the United States Supreme Court's decision in San Diego Gas & Electric Co. v. San Diego (1981) 450 U.S. 621.

In Agins plaintiffs owned five acres of unimproved land in Tiburon, which they acquired for residential development. The city adopted widespread zoning modifications, designating plaintiffs' land for one-family dwellings and open-space uses. As applied to plaintiffs' five acres, the zoning would permit a maximum of five dwelling units or a minimum of one. The city filed a complaint in eminent domain to acquire the property as open space, but then abandoned those proceedings. Plaintiffs did not make any application to use the property. Instead, they filed a complaint in inverse condemnation and for declaratory relief, alleging the adoption of the ordinance completely destroyed the value of their property. A demurrer was sustained without leave to amend.

The California Supreme Court affirmed. "[T]he need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy" persuaded the court that on balance, mandamus or declaratory relief rather than inverse condemantion was the appropriate remedy. (Agins, supra, 24 Cal.3d at pp. 276-277.) The court then concluded that plaintiffs had not established their entitlment to declaratory relief. "[A] zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property." (Id., at p. 277.) Because the ordinance on its face permitted plaintiffs to build between one and five residences on their acreage, as a matter of law it did not unconstitutionally interfere with their entire use of the land or impermissibly decrease its value. (Ibid.)

As the Agins court in effect concluded that there had been no "taking" of plaintiffs' land, it can be

argued that its rejection of inverse condemnation as an available remedy for a taking was not necessary to its decision and was therefore dictum. Nevertheless, as the inverse condemnation issue appears to have been elaborately considered, it is obviously entitled to great weight. (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 678, p. 4591, and cases cited therein.) In addition, it is apparent that the Supreme Court itself did not intend its discussion to be considered dictum (see Furey v. City of Sacramento (1979) 24 Cal.3d 862, 871), and it has not been treated as such in subsequent Court of Appeal cases. (See, e.g., Liberty v. California Coastal Com. (1980) 113 Cal.App.3d 491, 498; Gilliland v. County of Los Angeles (1981) 126 Cal.App.3d 610, 617.) Seascape's suggestion that this court treat Agins' inverse condemnation discussion as dictum is unpersuasive.

Seascape's contention that Agins has been disapproved by the United States Supreme Court is also

without merit. While that court has expressed reservations about whether a government entity may constitutionally limit the remedy available for a "taking" to nonmonetary relief, it has not yet squarely confronted the question.

Agins itself was affirmed by the United States Supreme Court on the ground that no taking had occurred, and the court did not consider whether a state may limit the remedies available to a person whose land has been taken without just compensation. (Agins v. Tiburon, supra, 447 U.S. 255, 263.) In San Diego Gas & Electric Co. v. San Diego, supra, 450 U.S. 621, upon which Seascape primarily relies, a power company owned over 200 acres in San Diego where it intended to build a power plant. The city rezoned the property in part as "open space." The company brought an action for inverse condemnation, and was awarded over $3,000,000. While the case was pending before the California Supreme Court, Agins was decided and the case was retransferred to the Court of

Appeal for reconsideration. That court, in an unpublished opinion, relied on Agins to hold (1) the company could not recover compensation through inverse condemnation; and (2) factual questions remained before it could be determined whether the company had been denied all use of its land. (Id., at pp. 629-632.)

The United States Supreme Court dismissed the appeal for lack of a final judgment, as it had not yet been decided whether any taking in fact occurred. Nevertheless, the court cautioned that the federal constitutional aspects of the state court's decision that the company was not entitled to a monetary remedy "are not to be cast aside lightly . . . ." (Id., at p. 633.) Dissenting, Justice Brennan and three others reached the constitutional question, and would have held that once a court establishes a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and

ending on the date the government chooses to rescind or otherwise amend the regulation. (Id., at p. 658.) Justice Rehnquist concurred with the majority that there had been no final judgment, but also noted that if the appeal were from a final judgment, he would "have little difficulty in agreeing with much of what is said" in the dissent. (Id., at pp. 633-634.)

While the United States Supreme Court may eventually conclude that California cannot limit the remedy available for a taking to nonmonetary relief, it has not yet done so, and this court is obligated to follow Agins. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.) That portion of the judgment awarding respondent Seascape damages in inverse condemnation must be reversed.

II

Although the trial court found that the subject property had been taken without just compensation, it concluded that the County's "zoning enactments" were a valid exercise of its police power, beyond attack

except in an inverse condemnation action, and dismissed Seascape's cause of action to declare ordinance 1800 invalid. Seascape has cross-appealed from that dismissal.

The trial court reached its conclusion without the benefit of Agins, in which the court held that if the effect of a zoning ordinance deprives the landowner of "substantially all reasonable use of his property," the ordinance may be unconstitutional and subject to invalidation. (Agins, supra, 24 Cal.3d at p. 277.) In light of Agins, it is apparent that the trial court's conclusion is inconsistent with its finding that Seascape has not been allowed any reasonable use of the subject property. If that finding is correct, this court may reverse with directions to enter judgment for Seascape declaring ordinance 1800 invalid on its face.[4/] (See 6 Witkin, Cal. Procedure (2d ed. 1971)

4/ Declaratory relief is the appropriate remedy by which to seek a declaration that a zoning ordinance is facially unconstitutional. (Agins, supra, 24 Cal.3d at pp. 272-273; see State of California v. Superior court (continued)

Appeal, § 547, p. 4488.)

The County and amicus California Coastal Commission argue, however, that the court's finding is erroneous. They attack that finding on alternative grounds. First, they argue that the court erred as a matter of law when it considered the 70-acre subject property in isolation to determine whether there had been a taking. Instead, it should have considered whether ordinance 1800 deprived Seascape of all reasonable use of its entire 110-acre parcel. Second, they urge that even if the subject property can properly be considered as a separate parcel, there was no taking because Seascape can be awarded density credits on its 40 acres of benchlands (or on its 200 acres of uplands) to compensate for the prohibition against building on the subject property. While they concede that no such credits have yet been awarded,

(Veta) (1974) 12 Cal.3d 237, 251.) A landowner who seeks to challenge the constitutionality of an act's application to his or her lands [i.e., when a development plan has been disapproved] must proceed by administrative mandamus. (Agins) at p. 273.)

they argue that the trial court erred when it found that the zoning ordinances absolutely preclude the award of density credits on the benchlands. In a related argument, the County and amicus also argue that because Seascape has not submitted a development plan for the 110 acres, it failed to exhaust its administrative remedies.

There is no litmus paper test under either federal or state law to determine when a taking has occurred. "[W]hether a regulation is excessive in any particular situation involves questions of degree, turning on the individual facts of each case ...." (Agins v. City of Tiburon, supra, 24 Cal.3d at p. 277.) The United States Supreme Court has declared itself unable to develop any set formula for determining what constitutes a "taking" for purposes of the Fifth Amendment. (Penn Central Transp. Co. v. New York City (1978) 438 U.S. 104, 123-124.) "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state

interests, see Nectow v. Cambridge, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see Penn Central Transp. Co. v. New York City, 438 U.S. 104, 138, n. 36 (1978). The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, see Kaiser Aetna v. United States, 444 U.S. 164 (1979), the question necessarily requires a weighing of private and public interests." (Agins v. Tiburon, supra, 447 U.S. at pp. 260-261.)

Decisional law under the takings clause of the federal Constitution has been described as "hopelessly confused," with lower courts differing widely in their analytical frameworks for resolving takings challenges. (Note, Developments - Zoning (1978) 91 Harv.L.Rev. 1427, 1464.) That confusion is particularly apparent in cases with facts similar to those at issue, where a

property owner alleges that governmental action restricting the use of a portion of his property constitutes a taking. Some courts consider the only question to be the effect of the regulations on the whole of the owner's contiguous property. (See, e.g., Am. Dredging v. State, Dept. of Environ. Pro. (1979) 169 N.J. Super. 18 [404 A.2d 42]; Multnomah County v. Howell (1972 Or.App.) 496 P.2d 235, 238.) Other courts focus on the restricted acreage, but also consider whether development rights have been denied outright, or transferred elsewhere. (See, e.g., American Sav. & Loan Ass'n v. County of Marin (1981) 653 F.2d 364; Fifth Avenue Corp. v. Washington County, etc. (1978) 282 Or. 591 [581 P.2d 50].)

We are persuaded that the approach suggested in American Sav. & Loan Ass'n v. County of Marin, supra, 653 F.2d 364 is the appropriate one, as it appears to provide for the most equitable accommodation of the conflicting public and private interests at stake in a "takings" challenge such as this one. As in this case,

the dispute in American Sav. & Loan Ass'n involved contiguous acreage under a single ownership, but subject to different zoning restrictions. Plaintiff owned Strawberry Point (20 acres) and Strawberry Spit (48 acres), two contiguous parcels. Marin County adopted a zoning ordinance allowing one multiple residential unit per five acres on the spit, and four per acre on the point. Plaintiff filed suit, claiming the ordinance was facially unconstitutional as applied to both parcels. Summary judgment for the County was granted, on the ground that the zoning permitted a reasonable profitable use of plaintiff's property as a whole.

The appellate court rejected the trial court's approach. It framed the question as ". . . whether the challenged ordinance create[d] two separate parcels for taking purposes by adopting different zoning designations for each parcel." (Id., at p. 370.) That question, the court explained, was one of fact which could not be resolved on summary judgment. Plain-

tiff's allegations that it had been deprived by a nonuniform ordinance of a substantial, economically viable portion of its property tended to require that the spit be evaluated separately for taking purposes. Nevertheless, without a development plan, it was impossible to tell whether plaintiff had actually been deprived of rights, or whether the county would make some provision for the transfer of those rights, i.e., through density transfers. Only when it was clear how the property would be treated at the development stage could a court determine "whether justice and fairness require[d] that [the property owner's] loss be compensated by the government." (Id., at p. 372.) In other words, when governmental action has divided contiguous property under single ownership into separate zones, and has restricted development in one of those zones, a provision allowing some transfer of development rights from the restricted property or awarding compensating densities elsewhere may preclude a finding that an unconstitutional taking has

occurred.

In support of their argument that the court should not have looked at the subject property in isolation, the County and amicus rely on Penn Central Transp. Co. v. New York, supra, 438 U.S. at page 130, wherein the Supreme Court stated: "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has been effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ."

Penn Central is factually distinguishable, however. The language upon which the County and amicus rely was the Supreme Court's response to an argument that a taking could be established merely by showing that an owner's ability to use air rights above Grand Central Terminal had been restricted by the applic-

ability of New York City's Landmarks Preservation Law. (Penn Central, supra, 438 U.S. at p. 130.) The case did not involve contiguous property for which different zoning designations were adopted, and the court's broad language does not resolve the question presented here. (See American Sav. & Loan Ass'n, supra, 653 F.2d at pp. 369-370.)

First, we note that the trial court made a special finding that the County has had the power at all times material herein to determine the base or basic densities for Seascape's uplands, and the compensating higher densities, if any, that would be added to that base density. With respect to the benchlands, however, the court concluded that the county's zoning ordinances absolutely precluded any grant of compensating densities. As we will explain, we have concluded that the court's construction of those ordinances was erroneous, and that the County can grant Seascape compensating densities on both its uplands and benchlands.

The rules of statutory construction are applicable to local ordinances (Kortum v. Alkire (1977) 69 Cal.App.3d 325, 334; see Kasunich v. Kraft (1962) 201 Cal.App.2d 177, 183), and the construction of a statute or ordinance is a question of law for the court. (Wilson v. County of Santa Clara (1977) 68 Cal.App.3d 78, 84.) Generally legislation should be construed, if reasonably possible, to preserve its constitutionality. (Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal.3d 294, 305.) When two alternative interpretations of a statute or ordinance are presented, one of which may be unconstitutional and the other constitutional, the court will choose that construction which will uphold the validity of the statute. (Kortum v. Alkire, supra, at p. 334.) "...[T]he constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary. [Citations.] Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property." (Hodel v. Virginia

Surface Mining & Recl. Assn. (1981) 452 U.S. 264, 297-295.) In addition, a statute or ordinance must be interpreted with reference to the whole system of law of which it is a part (People v. Comingore (1977) 20 Cal.3d 142, 147); if possible, significance and effect should be given to each section and part thereof. (Zorro Inv. Co. v. Great Pacific Securities Corp. (1977) 69 Cal.App.3d 907, 913.)

As has been stated, the benchlands were zoned P-1-6-PD, which would permit construction of one-family dwellings, at a density of one site per 6,000 square feet. The County contends that Seascape could have been granted greater density on the benchlands had it applied for a Planned Unit Development (PUD) permit. A PUD allows the construction of buildings on a tract free of conventional zoning so as to permit a cluster of structures and some increased density on some portions of a tract, leaving the remainder as open space. (Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal.3d 785,

796.) The County's zoning ordinances provided for PUDs, which could be located in any zoning district upon the granting of a use permit. (Santa Cruz County Code, § 13.04.305(b).) A PUD on a site of 10 acres or more, located in an R-1 district, could include any use permitted in any residential or C-1 (neighborhood commercial) district either as a permitted or conditional use. (Id., § 13.04.305(c).)

County Code section 13.04.306[5/] sets forth density

5/ That section provides in relevant part: "b. Density. The average number of dwelling units per developable acre shall not exceed the maximum number of dwelling units prescribed by the site regulations or the site area per dwelling unit regulation for the district in which the planned unit development is located subject, however, to the exception that the average number of dwelling units per developable acre may exceed the maximum number of dwelling units prescribed for a district by not more than 10% in a planned unit development on a site of ten acres or more.

"c. Exception. The development standards and density requirements of subsections (a) and (b) above shall not apply in the 'U-BS' Districts wherein the standards and density must be consistent with the applicable General Plan as determined by the Planning Commission or Board, as the case may be. (Ord. 1714, Sec. 2, May 9, 1972)."

standards for a PUD site area.

The trial court apparently read subdivision b of that section to mean that the maximum density which would be allowed in a PUD in an R-1-6 district would be one single-family residential unit per 6,000 square feet, despite the fact that, according to section 13.04.305(c), a hotel or multiple family dwelling was a permitted use in a PUD of over 10 acres located in such a district. In effect, the court's reading nullifies section 13.04.305(c) as it applies to an R-1-6 district.

In brief, the County's position is that a PUD on the benchlands could include multiple dwelling units at a density of one dwelling unit per 1,000 square feet. (Santa Cruz County Code, §§ 13.04.305(c); 13.04.212-A, subd. 10; 13.04.195, subd. a; 13.04.051, subd. a, subsec. 8; 13.04.110-D.) In addition, the County argues that a hotel is a permitted use in a C-1 district. (§ 13.04.212-A, subd. 5.) A hotel is not a dwelling unit, and the density limitations in section 13.04.306 would not be applicable to preclude the award of compensa-

ting densities through approval of a hotel in a PUD on the benchlands.

The County's zoning ordinances are complex and ambiguous, and the relationship among the various sections is confusing, as is apparent from the conflicting testimony from various officials charged at various times with administration of these ordinances.[6/] Nevertheless, the County's construction of the ordinances is preferable, as it would both give some effect and meaning to all the ordinances at issue, and avoid the possibility of a conclusion that ordinance 1800 is unconstitutional on its face. While the term

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6/ The trial court found that during the discussion prior to adopting ordinance 1800, the planning director informed the board of supervisors that no credit could be given for the arroyos and the beach if Seascape submitted a PUD for the benchlands. As the County points out, that conversation was ambiguous; the questioner asked about a PUD; the answer refers to a "PD," which is not the same as a PUD in Santa Cruz County. Moreover, while deference is generally accorded to the interpretation of ordinances by those whose task it is to administer them, in this case there was no unanimity among administrators as to the meaning of these ordinances.

"compensating density" does not appear as such in these ordinances, we conclude that in addition to granting compensating densities on the uplands, the County does have discretion to approve a PUD on the benchlands with varying uses and with a density greater than one single-family dwelling per 6,000 square feet. Accordingly, we cannot conclude that the mere enactment of ordinance 1800 constituted a taking.

"At this juncture, [Seascape is] free to pursue [its] reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied (it] the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments. [Citation.]" (Fn. omitted.) (Agins v. Tiburon, supra, 447 U.S. 255, 262-263.)

We must emphasize, however, that our conclusion rests on the premise that although development of the subject property is prohibited, the County's ordinances

do permit the grant of compensating densities to Seascape on both its benchlands and uplands in excess of the basic densities which the zoning of those parcels would permit absent any consideration of the subject property. To ensure the County's compliance with our decision, we will direct the trial court to modify its order dismissing Seascape's second cause of action by adding that the cause is dismissed on condition that the County does grant Seascape such compensating densities. Should any dispute arise after Seascape submits its development plan or plans for these parcels, the burden will be on the County to show that it has made provision either for the award of reasonable compensating densities or for some other transfer of development rights to Seascape in exchange for the prohibition against building on the subject property. (See American Sav. & Loan Ass'n, supra, 653 F.2d at p. 372.)

The County's Cross-Complaint

I

In its cross-complaint, the County alleged that Seascape Beach and its access ways had been impliedly dedicated to the public. The court found that prior to the development of Seascape's property, the beach was remote and secluded, with limited access, and public use was casual rather than substantial. As Seascape developed its property, it extended streets, which facilitated beach access. Public beach use gradually increased, and at some point between 1970 and 1973 public use became substantial rather than casual, but there was no substantial public use for any five-year period prior to July 31, 1972.

In that month, the public was granted permission to use the beach for recreational purposes pursuant to Civil Code Section 813.[7/]

The court concluded that there had been no dedication of any of Seascape's property to the public, except for certain recorded dedications and grants of easements. The court also concluded that Seascape is the owner in fee simple absolute of the real property described in the cross-complaint, and that the seaward boundary of that property is the "mean high tide line." (Civ. Code, § 830.)

7/ As amended in 1971, section 813 provides that a holder of record title may record a description of land and a notice that the right of the public to use the land is by permission and subject to control of the owner. The recorded notice is conclusive evidence in a judicial proceeding on the issue of dedication that public use is permissive and with consent. (Stats. 1971, ch. 941, § 1, p. 1845; see also Civ. Code, § 1009; 3 Witkin, Summary of Cal. Law (8th ed. 1973) Real Property, §§ 81 and 369, pp. 1836 and 2064.)

The County contends the trial court's findings with respect to public use of the beach are unsupported by the evidence. The County also contends that even if there has been no implied dedication, the seaward boundary of Seascape's fee is that point reached by the highest annual swells of the sea, and not by the mean high tide line.

"Adverse" use of shoreline property by the public for more than five years can result in an implied common law dedication of a public easement for recreational purposes in such property. (Gion v. City of Santa Cruz [consolidated with Dietz v. King] (1970) 2 Cal.3d 29, 38-39 (hereafter Gion-Dietz); County of Los Angeles v. Berk (1980) 26 Cal.3d 201, 209.) "The question then is whether the public has used the land 'for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by anyone.' [Citations.] . . . [T]he question is whether the public has engaged in 'long-continued adverse use'

of the land sufficient to raise the 'conclusive and undisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license.' [Citations.]" (Gion-Dietz, supra, at p. 38.)

Litigants seeking to establish such adverse use must show that persons have used the property as they would have used public land, or as if they believed the public had a right to such use. Gion-Dietz, supra, 2 Cal.3d at p. 39; County of Los Angeles v. Berk, supra, 26 Cal.3d at pp. 213-214.) That belief, as manifested by the public's actions with respect to the property, must be reasonable in light of all the circumstances. (Berk, supra, at p. 216.) Litigants must also show that various groups of persons rather than a limited and definable number used the land (Gion-Dietz, supra, at p. 39), and that public use has been "substantial." (Berk, supra, at p. 218; County of Orange v. Chandler-Sherman Corp. (1976) 54 Cal.App.3d 561, 565.) Evidence that users looked to a governmental agency

for maintenance of the land is significant in establishing an implied dedication to the public. (Gion-Dietz, supra, at p. 39.)

For a fee owner to negate a finding of intent to dedicate based on uninterrupted public use for more than five years, he or she must either affirmatively prove the grant of a license to use the property, or demonstrate a bona fide effort to attempt to prevent public use. While an owner's efforts may have been so minimal as to be inadequate as a matter of law, ordinarily the question is one of fact. (Gion-Dietz, supra, 2 Cal.3d at p. 41; County of Los Angeles v. Berk, supra, 26 Cal.3d at p. 216.)

The evidence with respect to the extent of the public's use of the beach prior to 1972 is in conflict, and it is elementary that this court is without power to reweigh the evidence and reach a factual determination contrary to that of the trial court. All factual matters must be viewed most favorably to the prevailing party and in support of the judgment. "In brief,

the appellate court ordinarily looks only at the evidence supporting the successful party, and disregards the contrary showing' [Citation.]" (Campbell v. Southern Pacific Co. (1978) 22 Cal.3d 51, 60, orignial italics.)

Viewed in that light, the evidence supports the trial court's findings. Prior to its purchase by Seascape, the area was part of a fenced horse and cattle ranch. In the middle of the ranch was a path to the beach, blocked by two wooden gates, which were kept closed. Ranch owner Krag only occasionally saw people walking along the beach at water's edge, fishing and clamming; not many people got onto the beach.

Seascape acquired the property in 1963. At the time the property above the beach was being used for farming, and the beach was generally desolate. Seascape developed the property north of Seascape Beach into a residential subdivision, and advertised it as including a private beach. As Seascape commenced street improvements, its employees noticed an

increase in people on the beach. Seascape hired people, including off-duty sheriff's deputies, to patrol the property and eject trespassers. On some occasions Seascape had vehicles towed away which were parked on the roads which led toward the beach. Eventually the corporation hired a fulltime security man who patrolled the beach in uniform, in a jeep, and was instructed to eliminate trespassers. At the time, Seascape permitted individuals from Rio del Mar tract to use the beach. On occasion Seascape gave specific permission to a group, such as a Boy Scout group, to use the beach. Seascape also gave sales promotional activities, and gave out passes for weekend use or day use. There was no evidence of any governmental maintenance of the area.

That evidence is sufficient to support the trial court's findings that prior to 1972, public use of the beach was not sufficiently substantial for any five-year period to negate the idea of mere license.

The County contends the public's use of the property is comparable to that of the public on the Dietz property in Gion-Dietz, apparently contending that the public's use is sufficient as a matter of law. The County's recitation of the facts in support of that contention, however, ignores the rule that this court must view those facts in the light most favorable to Seascape. In Dietz, the public in substantial numbers had used the beach and a road to the beach for over 100 years, to camp, picnic, collect driftwood, fish, and decorate graves at a small cemetery plot on the beach. Groups of Indians camped on the beach for weeks during the summer. The beach had also been used for commercial fishing, and there was no evidence that the respective fee owners had ever attempted to prevent this use. The evidence in this case, viewed in the light most favorable to the judgment, establishes no similar substantial use.

II

Civil Code section 830 provides in relevant part: "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to ordinary high-water mark; . . ." The high water mark refers to an average height of the high water at a particular place over a long period of time, ascertainable by reference to monuments and tidal data of the United States Coast and Geodetic Survey. (People v. Wm. Kent Estate Co. (1966) 242 Cal.App.2d 156, 159.)

Among its findings on the cross-complaint, the court found that the subject property is "included within the boundaries of the Aptos and San Andreas Mexican Grants, as surveyed, confirmed, patented, and conveyed by the United States . . . to Seascape's predecessors in the title pursuant to the Private Land Claims Act of 1851 . . . ." The court concluded that pursuant to Civil Code section 830, the seaward boundary of the property is the "mean high tide line,"

and that the federal patent did not indicate a different intent.

The County disagrees, and argues as follows: (1) the boundary is that provided by the Mexican law which prevailed when the original land grants were made; (2) that law provided that grants of land bordering on the sea bestowed title only to the point reached by the sea in its "highest annual swells" (in other words, to the highest high water mark); (3) Seascape's fee, therefore, extends only to the foot of the bluffs, and not as far toward the bay as the mean high tide line.

To fulfill its obligations under the Treaty of Guadalupe Hidalgo, under which California became a part of the United States, Congress enacted the Act of March 3, 1851, to ascertain and settle land claims in California. The act required persons claiming right or title in lands from the Spanish or Mexican governments to present their claims to a commission for settlement. Following a decree of confirmation by the

commission, the land was surveyed by the Surveyor General and a map of the survey prepared. Thereafter, on proof of confirmation and approved survey to the General Land Office, the federal goverment issued a patent to the claimant. The patent issued on confirmation of a land grant "was conclusive of both (a) the validity of the grant ... and (b) the land's boundaries. U.S. v. Coronado Beach Co. (1921) 255 US 472. Thus, if a patent conveyed title to the ordinary high tide line, there was no basis for an assertion that, under Mexican law, grants carried only to the highest high tide line and that consequently a strip of land between that line and the patent line remained public domain subject to entry." (Bowman, 2 Ogden's Revised Cal. Real Property Law (Cont.Ed.Bar 1975) §§ 26.2-26.3, pp. 1238-1239; see also 3 Witkin, Summary of Cal. Law (8th ed. 1973) Real Property, § 3, p. 1774.)

The record includes the 1860 and 1877 federal patents confirming the two land grants, and the 1858 and 1860 field notes of the final surveys of each

rancho. With respect to the Aptos Rancho, the notes state that the boundaries of the rancho are "well defined by the Bay of Monterey, the Shoquel Rancho, the Shoquel Augmentation Rancho, and the San Andres Rancho ...." The notes also state: Commenced at the junction of the Sanjon de Boregas with the sea at the corner No. 2, of the Shoquel Rancho ... I marked this post A. No. 1, and thence meander the sea coast." Similarly, the field notes of the final survey of the Rancho San Andres state in part: "To true corner at foot of bluff on beach of Monterey Bay Thence following the meanders of the shore of Monterey Bay at high water mark.... Surveyor Thomas Williams testified for Seascape that the boundary along Monterey Bay indicated in the patents and the field notes was the mean high water line.

The County argues at length that Williams' testimony was not credible, and offers its own complicated interpretation of the old field notes, in its effort to establish that the boundary as confirmed by the

patents was not the mean high tide line.

Despite the County's arguments, United States v. Pacheco (1864) 69 U.S. (2 Wall.) 587 and Coburn v. San Mateo County (C.C.N.D.Cal. 1896) 75 Fed. 520 are dispositive. Pacheco is an appeal from a decree confirming title to and the location of a Mexican grant to land on the east side of San Francisco Bay. The decree described the land as bounded "on the west by the bay." (United States v. Pacheco, supra, at p. 588.) The Supreme Court held that according to either common law or Mexican civil law, when the bay was given as a boundary and when nothing in the decree suggested otherwise, that boundary was the line of the ordinary high water mark. (Id., at p. 590.)

In Coburn, owner's land, bounded on the west by the Pacific, was originally part of a Mexican grant, on which a federal patent was issued. The description of its boundaries in the grant and the patent stated that the land bordered "to the west on the sea." (Coburn v. San Mateo County, supra, 75 Fed. at p. 526.) However,

meander lines on the plat of the rancho, surveyed by the United States surveyor, seemed to indicate that the western boundary of the land was on the bluff bordering on the sea, and not on the beach itself. Owner claimed the grant from the Mexican government included the tidelands. In an argument similar to that of the County in this case, respondent in Coburn relied on the meander lines and claimed that owner's grant did not even extend to the tidelands, but ended on the bluff.

The court disagreed with both parties. Relying on United States v. Pacheco, supra, 69 U.S. 587, it held that under common law or Mexican civil law, because the bay was given as the boundary in the grant, that boundary was the high water mark. As for the meander lines, "it is well settled that they do not limit the boundary of the grant. Their purpose is to ascertain the quantity of land to be charged for." (Coburn, supra, 75 Fed. at p. 530.) The high water mark, and not the meander line, was the boundary. (Id., at p.

531; see also Stillwell v. Jackson (1936) 5 Cal.2d 165, 169 [In the absence of any other declared purpose, a meander line of description, used as a means of measuring and correctly locating the shore line, represents the line of ordinary high tide].)

The trial court did not err when it concluded that the seaward boundary of Seascape's fee was the mean high tide line, and that the federal patent did not indicate a different intent.[8/]

The County also contends that even if the bayward boundary of Seascape's lands extends to the mean high water line, the beach up to the highest high water

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8/ City of Los Angeles v. Venice Peninsula Properties (1982) 31 Cal.3d 288, decided after briefing was completed in this case, is distinguishable. In that case, notwithstanding the rule that a federal patent conclusively determines the boundaries of a grant, the Supreme Court held that the trial court properly took evidence as to whether a lagoon was an arm of the sea (and therefore tidelands) in 1850, as there was an ambiguity and inconsistency between the terms of the patent and the opinion of the Land Office Commissioner who had approved the underlying survey. (Id., at pp. 295-296.) In this case, however, there were no comparable inconsistencies; rather, the question was the meaning of the terms of the patents.

mark is burdened with a "public servitude" similar to the "public trust easement" which exists in California tidelands conveyed by patent to private individuals. (See Marks v. Whitney (1971) 6 Cal.3d 251, 257-261.)

"Tidelands" are lands between the lines of mean high tide and mean low tide, covered and uncovered successively by the tidal ebb and flow. (Marks v. Whitney, supra, 6 Cal.3d at pp. 257-258; City of Berkeley v. Superior Court (1980) 26 Cal.3d 515, 518-519, fn. 1.) When tidelands have been granted by the state to a private party, that party receives the title to the soil, subject to the public's right to use the property for purposes such as commerce, navigation, fishing, as well as for environmental and recreational purposes. (City of Los Angeles v. Venice Peninsula Properties, supra, 31 Cal.3d at p. 291; City of Berkeley, supra, 26 Cal.3d at p. 521; Marks v. Whitney, supra, 6 Cal.3d at p. 259.) In other words, such lands are subject to a public trust easement. (Ibid.) The County's theory in this case is: (1) under Mexican law,

there was an analagous public servitude in lands between the highest high water line and the mean low tide; (2) the servitude was not extinguished by issuance of the federal patents; (3) even if Seascape took title to the mean high tide line, the strip of land between the highest tide line and the mean high tide line remains subject to an easement for public use.

In light of City of Los Angeles v. Venice Peninsula Properties, supra, 31 Cal.3d 288, we conclude that the trial court correctly concluded that Seascape's property was not subject to any servitude. In that case, the court held that the public trust doctrine applies to tidelands which were originally acquired by private persons from the Mexican government prior to the time California was ceded to the United States, and which were later patented to the owners by the federal government in accordance with the requirements of the Treaty of Guadalupe Hidalgo. (Id., at p. 291.) While the case confirms the County's analysis of the effect of a federal patent, it does not support the

County's interpretation of the extent of the public's rights in land adjacent to the sea under Mexican law. The court flatly stated, "The law of Mexico ... declared that the public had a right to the use of the tidelands ...." (Id., at p. 297, emphasis added.) As already explained, "tidelands" are lands between the lines of mean high tide and mean low tide. (Marks v. Whitney, supra, 6 Cal.3d at pp. 257-258.) Nothing in City of Los Angeles supports the notion that the public's rights under Mexican law extended beyond the tidelands to the highest high water line, as the County would have this court hold.

That portion of the judgment concluding Seascape's property has been taken without just compensation and awarding damages for the taking is reversed. The trial court is directed to modify that portion of the judgment dismissing Seascape's second cause of action for declaratory relief by conditioning that dismissal on the grant of compensating densities to Seascape; as modified, that portion of the judgment

is affirmed. Judgment in favor of Seascape on the County's cross-complaint is affirmed. Each party to bear its own costs.

CERTIFIED FOR PUBLICATION

Scott, J.

We concur:

White, P.J.

Barry-Deal, J.

Trial Court: Superior Court, County of Santa Cruz

Trial Judge: Roland K. Hall

Counsel for Plaintiff, Cross-defendant and Appellant:

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APPENDIX D

1 CIVIL NO. 46963

COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

APTOS SEASCAPE CORPORATION,
a California corporation,

Plaintiff and Cross-Defendant,
Respondent and Cross-Appellant,

v.

THE COUNTY OF SANTA CRUZ,
BOARD OF SUPERVISORS OF THE
COUNTY OF SANTA CRUZ,
PLANNING COMMISSION OF THE
COUNTY OF SANTA CRUZ, et al.,

Defendants and Cross-Complainants,
Appellants and Cross-Respondents,

AND RELATED ACTION.

RESPONDENT AND CROSS-APPELLANT'S PETITION FOR REHEARING

Appeal from the Judgment of the Superior Court
of the State of California, in and for the
County of Santa Cruz
Honorable Roland K. Hall, Judge

DENNIS J. KEHOE, ESQ.
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Attorneys for
APTOS SEASCAPE CORPORATION
Respondent and Cross-Appellant

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COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

APTOS SEASCAPE CORPORATION,
a California corporation,

Plaintiff and Cross-Defendant,
Respondent and Cross-Appellant,

v.

THE COUNTY OF SANTA CRUZ,
BOARD OF SUPERVISORS OF THE
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PLANNING COMMISSION OF THE
COUNTY OF SANTA CRUZ, et al.,

Defendants and Cross-Complainants,
Appellants and Cross-Respondents,

AND RELATED ACTION.

RESPONDENT AND CROSS-APPELLANT'S PETITION FOR REHEARING

To the Presiding Justice, and to the Associate Justices of the Court of Appeal of the State of

California, First Appellate District, Division Three. Respondent and Cross-Appellant, Aptos Seascape Corporation, petitions for a rehearing to reconsider that portion of the Court of Appeal decision dealing with Aptos Seascape Corporation v. County, et al., only, and not that portion of the decision with respect to the Cross-Complaint. Said decision was filed in this Court and in this action on December 23, 1982. The following grounds are:

1. Substantial issues of law and fact, and each of them, were incorrectly stated.

2. Substantial issues of law and fact, and each of them, were not considered.

3. Legal and factual error, and each of them.

I

RESPONDENT AND CROSS-APPELLANT IS ENTITLED TO RECOVER COSTS, INCLUDING EXPERTS' FEES AND ATTORNEY'S FEES, AGAINST THE COUNTY OF SANTA CRUZ.

The trial court Judgment, provided, inter alia, the County of Santa Cruz with the option to allow higher densities. Yet, the County chose not to exercise this option and, according to the lower Court Judgment, monetary damages were awarded. CT 2010-2012, The trial court Judgement further provided that, regardless of whether monetary damages or higher densities were chosen by the County, the landowner was awarded costs of suit, including experts' fees and attorney's fees. CT 2012, L. 11-14.

This Court of Appeal ordered, inter alia, that the County grant Seascape higher densities. Court of Appeal decision (hereinafter referred to as CA), page 20.

Costs of suit including attorney's fees and experts' fees, on both the trial court and appellate court levels, should be awarded to Seascape. Sections 1021.5 and 1036 of the Code of Civil Procedure, and each section. Further, the attorney's Fees Award Act evidences a clear legislative intent that costs of suit including

expert fees and attorney's fess must be awarded Seascape. 42 U.S.C. 1988; Bonnes v. Long (1979) 599 F.2d 1316, 1319; Johnson v. State of Mississippi (1979) 606 F.2d 635, 637-639; Kimbrough v. Arkansas Activities Assoc. (1978) 574 F.2d 423.

II

MONETARY DAMAGES ARE REQUIRED BY, INTER ALIA, THE "JUST COMPENSATION" CLAUSE OF THE UNITED STATES CONSTITUTION.

Seascape respectfully submits that the Court of Appeal erred in determining that the Judgment awarding Seascape damages in inverse condemnation must be reversed.

The comments of the California Supreme Court in Agins v. Tiburon (1979) 24 C3d 266 concerning a damage award in inverse condemnation is dicta. See CA, page 7. Second, the Court of Appeal is duty-bound to follow the United States Constitution rather

than the misdirection in Agins. California Constitution, Article III, Section 1. The Fifth and Fourteenth Amendments to the United States constitution require the payment of "just compensation" including damages to the landowner. This is the law of the country. See Burrows v. City of Keene (1981) 432 A.2d 15, 20; In Re Aircrash in Bali, Indonesia (1982, 9th Cir.) 684 F.2d 1301, 1311, fn. 7. Third, the rights of this landowner are basic civil rights that have long been protected by both the United States Constitution and the Federal Civil Rights Act, 42 U.S.C. §1983. Lynch v. Finance Corp. (1972) 405 U.S. 538, 552. The United States Supreme Court clearly affirmed that a "damage remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees ..." Owens v. City of Independence (1980) 445 U.S. 622, 651, 100 S.Ct. 1398, 1415-1417; see also Justice Brennan's dissent summarizing the viewpoint of the majority in San Diego Gas and Electric Co. v. San Diego (1981) 450 U.S. 621, 654-657,

101 S.Ct. 1287, 1305 and 1308.

The decision of the Court of Appeal did not consider the Federal Civil Rights Act, 42 U.S.C. 1983, which provides, inter alia, a damage remedy. Seascape is entitled to the monetary damages as provided in the lower court Judgment as well as interim damages. The County of Santa Cruz refused to exercise the option to provide additional densities as set forth in the trial court Judgment and, therefore, chose to pay monetary compensation. fn.1.

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fn.1. "Just compensation" mandated by the United States Constitution requires, inter alia, certainty, a full equivalent, and monetary compensation. Fifth and Fourteenth Amendments of the United States Constitution. Neither higher densities nor, for that matter, invalidation are "just compensation". Further, neither can be used to avoid a taking. The State courts must yield to the federal constitutional requirements including "just compensation". City of Oakland v. Oakland Raiders (1982) 31 C3d 656, 663.

III

OTHER ERRORS

Respondent respectfully notes several other errors in the decision of the Court of Appeal. Seascape alleged and proved and the trial court found and determined after an extended court trial that, as a result of a series of actions and inactions by the County over a lengthy period of time, the County of Santa Cruz violated the Constitutional rights of Seascape and a taking had occurred. e.g., see First Amended Complaint, CT 71 and 76-77; Findings of Fact No. 36 and 37, CT 1989; Conclusions of Law No. 1, CT 1999. Nevertheless, the Court of Appeal decision categorizes this matter as a "mere" rezoning case. See CA pages 3 and 19. This is an error.

The decision of the Court of Appeal is in error with respect to its determination that the trial court erroneously viewed the County ordinances, with particular reference to the PUD Ordinances. CA, pages 15-19. Initially, the trial court had an extended

opportunity to consider the County ordinances in the context of their formulation, application and utilization by the County within the crucible of this factual situation and prior to any litigation arguments set forth by the County. The County actions and inactions over the years are abundantly clear and a taking has occurred. Extensive testimony, both oral and documentary, was taken by the Court and it clearly found and determined that the County blatantly demonstrated an absolute unwillingness to provide Seascape with any higher densities, whatsoever (regardless of the nature of the same), as evidenced by the County's actions and inactions over a period of time. e.g., Finding of Fact no. 22, 23, 25 and 31, CT 1987-1988. Not only is the lower court Judgment presumed to be correct, but any conflict must be resolved in favor of the same. Further, a "reviewing court is without power to substitute its deductions for those of the trial court". Campbell v. Southern Pacific Co. (1978) 22 C3d 51, 60. Thus, the trial court, having considered

the County ordinances and conduct in the crucible of an actual fact situation, properly made its determination. This must be followed in the appellate review process.

Further, even looking at the naked County ordinances disassociated from this factual situation, the County created an impediment to the provision of higher densities of any kind to the landowner. For example, the County specifically required in its own ordinance that, in order to grant a PUD in a UBS zone district, the "standards and densities must be consistent" with the Aptos Area Plan. §13.04.306c of the County Ordinances; Exhibit CC, pages 13-95. Confirming that which the County has earlier accomplished the Aptos Area General Plan adopted in 1974 not only designated the subject 70 acres "park-playground", but also made no provision for compensating higher densities. RT I, 216, RT VII, 73, L. 21-23. The earlier 1967 Aptos Area Plan called for the creation of a new PLANNED COMMUNITY DISTRICT

as a mechanism to provide compensating higher densities. Yet, no such Planned Community District was ever formed by the County. RT I, 25-26, L. 6; RT XV, 168, L. 16-169, L. 9; Respondent's Appellate Brief dated August 3, 1981, pages 14-17. The dialogue between the Planning Director (Monasch) and the Board of Supervisors clearly points this out, not only when reviewed by itself but especially when considered in the context of all the facts of this case. Exhibit 22.

Seascape respectfully submits that the Petition for Rehearing be granted.

Respectfully submitted,

January 6, 1982.

ADAMS, LEVIN, KEHOE,
BOSSO, SACHS & BATES
A Professional Corporation

/s/ Dennis J. Kehoe
DENNIS J. KEHOE, Attorney for
APTOS SEASCAPE CORPORATION
Respondent and Cross-Appellant

DECLARATION OF SERVICE BY MAIL

R: APTOS SEASCAPE v. COUNTY OF SANTA CRUZ, NO. 1 CIVIL 46963

I, JANE A FARINSKY, declare that I am over 18 years of age, and not a party to the within cause; my business address is 323 Church Street, Santa Cruz, CA 95060. I served a true copy of the attached RESPONDENT AND CROSS-APPELLANT'S PETITION FOR REHEARING on each of the following, by placing same in an envelope addressed as follows:

Clair A. Carlson
County Counsel
701 Ocean Street
Santa Cruz, CA 95060

Peter L. Townsend, Esq.
Garrison, Townsend & Hall
Post Office Box 7420
San Francisco, CA 94120

Honorable Roland K. Hall
Judge of the Superior Court
701 Ocean Street
Santa Cruz, CA 95060

T. Roy Gorman, Chief Counsel
California Coastal Commission
631 Howard Street
San Francisco, CA 94105

Each said envelope was then, on January 6, 1983 sealed and deposited in the United States mail at Santa Cruz, California, the county in which I am employed, with the postage thereon fully prepaid.

I have also caused a copy of the above described document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court.

I have delivered seven copies of the above described document to the Clerk of the Supreme Court of the State of California.

Executed on January 6, 1983 at Santa Cruz, CA. I declare under penalty of perjury that the foregoing is true and correct.

/s/ J. Farinsky
JANE A. FARINSKY

APPENDIX E

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION THREE

Aptos Seascape Corporation,

Plaintiff and Appellant,

vs.

County of Santa Cruz, etc. et al.

Defendants and Appellants.

1/Civ.46963

No. A012759
Superior Court No.____

FILED

JAN 21 1983
Court of Appeal - First Dist.
By CLIFFORD C. PORTER, Clerk
Deputy

BY THE COURT;

The petitions for rehearing are denied.

Dated JAN 21 1983

WHITE, P.J.

APPENDIX F

NO. 1 Civil 46963

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

APTOS SEASCAPE CORPORATION,
a California corporation,

Plaintiff and Cross-Defendant,
Respondent and Cross-Appellant,
and Petitioner herein,

v.

COUNTY OF SANTA CRUZ,
BOARD OF SUPERVISORS OF THE
COUNTY OF SANTA CRUZ,
PLANNING COMMISSION OF THE
COUNTY OF SANTA CRUZ, et al.,

Defendants and Cross-Complainants,
Appellants and Cross-Respondents,
and Respondents herein.

AND RELATED ACTION.

Superor Court
No. 50142

FILED
JAN 31 1983
LAURENCE P.GILL, Clerk
Deputy

APTOS SEASCAPE CORPORATION'S PETITION FOR HEARING

From a Portion, Only, of the Decision of the Court of Appeal of the State of California, First Appellate District, Division Three

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

APTOS SEASCAPE CORPORATION,
a California corporation,

Plaintiff and Cross-Defendant,
Respondent and Cross-Appellant,
and Petitioner herein,

v.

COUNTY OF SANTA CRUZ,
BOARD OF SUPERVISORS OF THE
COUNTY OF SANTA CRUZ,
PLANNING COMMISSION OF THE
COUNTY OF SANTA CRUZ, et al.,

Defendants and Cross-Complainants,
Appellants and Cross-Respondents,
and Respondents herein.

AND RELATED ACTION.

Superior Court
No. 50142

APTOS SEASCAPE CORPORATION'S

PETITION FOR HEARING

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

I

INTRODUCTORY CLAUSE

A. Petition for Hearing from a Portion Only, of the Decision of the Court of Appeal.

In the pleadings, the County of Santa Cruz (County) filed a Cross-Complaint against Aptos Seascape Corporation (Seascape) claiming under Gion various items. The Trial Court found in favor of Seascape and against the County on the Cross-Complaint and Judgment was entered by the Trial Court in favor of Seascape and against the County on said Cross-Complaint. CT 1991-1999; CT 2001; and CT 2013. The decision of the Court of Appeal filed on December 23, 1982 affirmed, in total, the Judgment of the lower court on the Cross-Complaint. See p. 31. Seascape does not Petition for a Hearing on that portion of the Decision of the Court of Appeal affirming the Judgment in favor of Seascape and against the County on the Cross-Complaint. Seascape does Petition for a Hearing on the other portion of the

Decision of the Court of Appeal dealing with the Judgment of the Trial Court on the action by Seascape against County.

B. Trial Court.

A First Amended Complaint for Damages and Inverse Condemnation and Declaratory Relief was filed on behalf of Seascape. It set forth a FIRST CAUSE OF ACTION seeking monetary damages under, inter alia, inverse condemnation and a SECOND CAUSE OF ACTION seeking declaratory relief and monetary damages. CT 68-95.

The County filed Motions for Summary Judgment and Judgment on the Pleadings. CT 669-670. Legal Memoranda was filed in opposition thereto by Aptos Seascape. CT 774-824; CT 840-845; CT 992-1008. The hearing on the Motion was held on July 29, 1977 and all of the County's Motions were denied except for the Motion for Judgment on the Pleadings to the SECOND CAUSE OF ACTION for declaratory relief and monetary damages (referred to as Count 2 in the Order). As

to the SECOND CAUSE OF ACTION, the Judgment on the Pleadings was granted. CT 1018-1019. The County filed yet another Motion for Summary Judgment. Substantial documentation was once again filed in opposition to the same. CT 1418-1428. The Motion was considered and denied. CT 1444; CT 2010, L. 4-9.

Trial Briefs were filed by the parties. CT 1404, et seq.; CT 1429, et seq.; CT 1464, et seq.; CT 1474, et seq. This was a Court Trial and it lasted from May 8, 1978 through June 29, 1978. CT 1444 and 1555. The Court also viewed the subject property. CT 1496. After closing arguments, post trial briefs were submitted to the Court. CT 1640, et seq. and 1716, et seq. Subsequently, a Memorandum of Intended Decision was filed by the Court. CT 1756-1784. Findings of Fact and Conclusions of Law were requested. CT. 1785. Findings of Fact and Conclusions of Law were prepared and filed by the Court. CT 1979-2006. At the same time, a Judgment was prepared and filed. CT

2007-2016.

The Trial Court, after an extremely lengthly Court Trial, determined that the federal constitutional rights of Aptos Seascape were violated including those rights protected under the due process clause and the just compensation clause. Among other findings, the evidence clearly established and the Trial Court properly determined that: (1) The actions and inactions of the County over a lengthy period of time has deprived Seascape of all reasonable, practical, beneficial and economic use, and each of them, of the subject 70 acres for which just compensation was due, owing and payable by County to Seascape. CT 1999, L. 16-21; CT 1987, L. 1-21; CT 1999, L. 12-13; RT I, 182-184; RT I, 218-219, L. 6: RT I, 223; RT IV, 99 and 125; RT II, 245, L. 4-25; RT II 249, L. 19-23; RT XV 93, L. 16-94, L. 21; RT XV 152, L. 16-23; RT IV 9 L. 12- 10, L. 4; RT IV 107, L. 13-19. (2) The County caused and accomplished a de facto taking of the subject 70 areas entitling Seascape to Judgment against County in

inverse condemnation. CT 1999, L. 22-23. (3) By its actions and inactions over a period of time, the County had taken the subject property for the benefit of the public, for which public funds may be expended by County. CT 1989, L. 1-15; CT 2000, L. 1-4. (4) Seascape had fully exhausted all available administrative remedies. Any additional attempt by Seascape to petition the County for relief would be futile. CT 1988, L. 17-19; RT I 216-218 and 223; RT IV 94 L. 2-23. (5) The subject property had been treated by the County as a separate parcel. The subject property is a de facto separate parcel of property from other land owned by Seascape. CT 1987, L. 28, CT 1988, L. 2; RT II 11, L. 3-24 and 59; RT I 155, L. 9-12. (6) Just compensation in the amount of $3,150,000 as well as costs of suit including attorney's fees and experts' fees were due, owing and payable by County to Seascape. CT 2000, L. 8-21; CT 1990, L. 8-28; RT II 249; RT IV 41.

The Judgment provided, as an alternate means of compensation and at County's sole discretion, County could provide Seascape with 200 compensating higher densities on other property owned by Seascape. The Judgment also stated that, if the County chose not to exercise the alternate form of Judgment, the principle amount of $3,150,000, together with interest thereon was awarded. CT 2010-2013.[1/] Regardless of what

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fn.1. The alternate form of Judgment is contained in the Clerk's Transcript, pages 2010-2013. Highlighting the same reveals the following:

a. Within 60 days of the entry of judgment, the County had the opportunity to file a resolution accepting this option and enacting and enabling an ordinance providing a mechanism for compensating higher denisties. CT 2012, L. 15-27.

b. A five-year period was provided for the processing of 200 compensating higher densities by the County. CT 2011, L. 8 to CT 2012, L. 7.

c. If the landowner was not provided all the 200 higher compensating higher densities within the five-year period, then $15,750, plus interest, per unit, not so provided was set forth. CT 2011, L. 19 to CT 2012, L. 7.

d. The Court further retained jurisdiction of this matter. CT 2012, L. 8-10.

e. The alternate, if not exercised by the County of Santa Cruz, was void. The County did not chose this alternate (a copy of the Trial Court Judgment is attached for the convenience of the Court). CT 2012, L. 28 to CT 2013, L. 6.

mode of compensation was chosen by the County, Seascape was awarded its costs of suit including experts' fees and attorney's fees. CT 2012, L. 11-14.

C. Court of Appeal.

After extremely lengthy briefs filed on behalf of County, California Coastal Commission (Amicus Brief) and Seascape, and subsequent to oral argument, the Court of Appeal filed its Decision on December 23, 1982, a copy of which is attached hereto and incorporated herein by reference. Petitions for Rehearing were filed on behalf of the County and Coastal Commission to which an Answer was filed by Seascape. Seascape, also, filed a brief Petition for Rehearing and no answer thereto was filed. All Petitions for Rehearing were denied by the Court of Appeal.

Based upon Agins v.Tiburon (1979) 24 C3d 266, the Court of Appeal, incorrectly, reversed that portion of the Judgment awarding Seascape damages in inverse condemnation, concluding that a landowner may not

sue in inverse condemnation for damages. Court of Appeal Decision (hereinafter referred to as CA), page 10. Nevertheless, the Court of Appeal did acknowledge that "... the United States Supreme Court may eventually conclude that California cannot limit the remedy available for a taking to nonmonetary relief ..." CA 9.

The Court of Appeal, with respect to the SECOND CAUSE OF ACTION for Declaratory Relief and Monetary Damages, affirmed the dismissal of the same; however, the dismissal was modified wherein the Trial Court was directed, inter alia, to "... modify its order dismissing Seascape's Second Cause of Action by adding that the cause is dismissed on condition that the County does grant Seascape such compensating densities."[4] CA 20 and 31. The Court of Appeal further directed that each party bear its own costs. CA 31.

II

GROUNDS UPON WHICH A HEARING SHOULD BE GRANTED

The grounds for ordering a hearing include (1) there needs to be a settlement of important questions of law, and (2) the state court decisions need to conform with the United States Constitution and thereby create uniformity. Rules of Court, §29. Further, substantial issues of law and fact, and each of them, are incorrectly stated in the Decision of the Court of Appeal. Also, the Court of Appeal did not consider substantial issues of law and fact, and each of them.

The Federal Constitution requires the award of monetary damages and a limitation to purported nonmonetary relief is contrary to that same Federal Constitution. Moreover, cost of suit including attorney's fees and experts' fees must be awarded to Seascape under the just compensation clause as well as 42 U.S.C. §1988 and under California law §1021.5 and

§1036 of the Code of Civil Procedure. Further, the Federal Civil Rights Act, 42 U.S.C. §1983, et seq., guarantees injunctive relief and monetary relief. Neither the Federal Constitution nor the Federal Civil Rights Act can be tampered with, altered, or amended by either the State Legislature or the State Judiciary.

III

THE FEDERAL CONSTITUTION MANDATES, INTER ALIA, THE AWARD OF MONETARY DAMAGES AS SET FORTH BY THE TRIAL COURT IN THE JUDGMENT.

A. The County has the Power to Expend Public Funds.

County has not only the power to expend public funds to purchase land for parks, but also to purchase the fee or any lesser interest or right in real property in order to acquire, maintain or preserve open space. Gov. Code §§ 6952 and 51073. This legislative declaration is significant in this litigation in that the expressed legislative purpose is to authorize the

expenditure of public funds to acquire "... the fee or any lesser interest, development right, easement, covenant or other contractual right ..." necessary to preserve open space and that the same constitutes a "... public purpose ..." for which public funds may be expended. Gov. Code §§ 6953 and 51073.

County does not, because it cannot, argue that it lacks the power to acquire the subject property through appropriate eminent domain proceedings. Unfortunately, County has sought to do by indirection what it had the clear, legal duty to do directly. The result is litigation instituted by the property owner rather than the condemnor.

The legislative authorization for public entities to expend public funds for the acquisition of open space is not an isolated provision of law. The State and Federal Constitutions and the Government Code are consistent in the explicit requirement that the acquisition of open space, while a valid and even important function of government, necessarily requires just

compensation to the landowner. The Legislature has decreed that every city and county must have in effect a local open space plan. It has further required the adoption of an open space zoning ordinance consistent with such plan. Gov. Code §§ 65563 and 65910. Again, however, the Legislature has clearly provided that the cost of this public benefit is to be borne not by the private property owner, but by the public at large through the governmental entity:

> The legislature hereby finds and declares that this Article is not intended, and shall not be construed, as authorizing the city or the County to exercise its power to adopt, amend or repeal an open space zoning ordinance in a manner which will TAKE OR DAMAGE PRIVATE PROPERTY FOR PUBLIC USE WITHOUT THE PAYMENT OF JUST COMPENSATION THEREFOR. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or of the United States. Gov. C. §65912. (Emphasis added.)

The cases reveal the same underlying attitude:

> 'The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should

> not pay for property which it destroys or impairs the value, as well as for what it physically takes. ...'
>
> Bacich v. Board of Control (1943) 23 C2d 343, 351.
>
> The Fifth Amendment's (of the Federal Constitution) guarantees that the private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.
>
> Armstrong v. United States (1960) 364 U.S. 40, 49.

County is well aware of the requirements of just compensation where property is taken or damaged by a public entity. In a report prepared for the County dated July 28, 1970, and entitled "Open Space, and How to Keep It", it is stated as follows:

> One of the basic, fundamental precepts of American law is the right of a landowner to the use of his land or to be adequately compensated for the loss if a public agency takes the land for public use. This right must be kept in mind in assessing alternatives for acquiring or preserving open space just as it must be kept in mind in the

> acquisition of land for any other purpose by a public agency.
>
> Thus, a public agency such as the County of Santa Cruz must compensate the owner of open space land which the agency desires to acquire for the benefit of the public ... (Report to the Board of Supervisors, dated July 28, 1970, p. 3, third paragraph from the top, CT 2378)

The Santa Cruz County Grand Jury Report for Fiscal July 1, 1972 through June 30, 1973, commenting on a pervading County Planning attitude pointed out: "... no matter how well intended or carefully devised such planning may be, experience has shown that, for some property owners the results cannot help but be punitive or even tantamount to confiscation ..." It is further recommended that property owners should be fairly and duly compensated. Grand Jury Report, Exhibit 24, CT 2317-2319.

The landowner has submitted various land use proposals for the subject property but to no avail. RT

I 216-218 and 223, II-8.[2]

County has successfully acquired the subject 70 acres. Yet, rather than compensate the landowner through an appropriate mode, the County has utilized, inter alia, a series of actions and inactions over a number of years in a heretofore unsuccessful attempt to obfuscate Seascape's rights under the United States Constitution.

B. The United States Constitution requires the Award of Monetary Damages as set forth in the Trial Court Judgment.

The Fifth and Fourteenth Amendments of the United States Constitution vest in Seascape the right to due process of law, just compensation when private property is taken for public use, and equal protection

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fn.2. Moreover, the United States Supreme Court has pointed out that exhaustion of any so-called administrative remedies is not a prerequisite. Patsy v. Board of Regents of the State of Florida (1982) __U.S.__, 73 L.Ed.2d 172, 102 S.Ct. 2557

of the laws. These rights are personal and fundamental to Seascape and protected by not only the Federal Constitution but also by Title 42 U.S.C § 1983, et seq., the Federal Civil Rights Act. Lynch v. Household Finance Corporation (1972) 405 U.S. 538, 552.

The highest court of the land has indicated that the concept of "property" in the Fifth Amendment is designed to protect the full range of interests that citizens possess. Property rights "denote the group of rights inherent in the citizen's relationship to the physical thing, such as the right to possess, use and dispose of it." United States v. General Motors Corp. (1945) 323 U.S. 373, 377. The United States Supreme Court has further stressed:

> [We] have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking.
>
> United States v. Central Eureka Mining Co. (1958) 357 U.S. 155, 168.

The individual landowner should not in fairness and justice bear the burden of a public benefit that should

be borne by the public as a whole. Armstrong v. United States (1960) 364 U.S. 40; . United States v. Willow River Power Co. (1945) 324 U.S. 499, 502; and Pennsylvania Coal Co. v. Mahon (1922) 260 U.S. 393.

In San Diego Gas and Electric co v. City of San Diego (1981) 450 U.S. 626, 654-57, 101 S.Ct. 1287, 1308 and 1305, Justice Brennan, in dissent, summarizes the viewpoint of a majority[3] of the United States Supreme Court:

> The applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches. Nor can the vindication of these rights depend on the expense on doing so. (Citations).
>
> ....
>
> The language of the FIFTH AMENDMENT prohibits the 'taking' of private property for 'public use' without payment of 'just compensation' as soon as private property has been taken,

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fn.3. See Justice Rehnquist's concurring opinion which agrees with the views of the four dissenting Justices on the substantive taking question (at 129).

> whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the owner has ALREADY suffered a constitutional violation, and ""the self-executing character of the constitutional provision with respect to compensation"" (Citations) is triggersd. This court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a '"taking"', compensation MUST be awarded. (Emphasis in original opinion).

The writer of the majority opinion in Agins v. City of Tiburon (1980) 446 U.S. 907, was Justice Powell, and he joined with Justice Brennan in expressing the views of the majority of the court in this dissenting opinion.

The importance and availability of the damage remedy for violations of Federal Constitutional rights was also recently reaffirmed in Owens v. City of Independence (1980) 445 U.S. 622, 651, 100 S.Ct. 1398, 1415-17, where the court emphatically held that damages are available and should be awarded when Constitutional rights are violated, regardless of the purported good faith of the governmental action.

By its own action, County has chosen a monetary judgment. County is now bound by its own choice.

C. The Comments in Agins v. Tiburon Prohibiting a Damage Remedy must yield to the United States Constitution.

The comments of the California Supreme Court in Agins v. Tiburon (1979) 24 C3d 266 concerning a damage award are dicta. See CA 7. Second, all levels of the State court judiciary are duty-bound to follow the United States Constitution. California Constitution, Article III, Section 1. The Fifth and Fourteenth Amendments to the United States Constitution require the payment of "just compensation", including damages to the landowner. This is the law of this Country. See Burrows v. City of Keene (1981) 432 A.2d 15, 20; In Re Aircrash in Bali Indonesia (1982, 9th Cir.) 684 F.2d 1301, 1311, fn.7. The State courts must yield to the Federal constitutional requirements including "just compensation". City of Oakland v. Oakland Raiders Friends (1982) 32 C3d 60, 67. Third, the rights of this

landowner are basic civil rights that have long been protected by both the United States Constitution and the Federal Civil Rights Act, 42 U.S.C. §1983, Lynch v. Household Finance Corp. (1972), supra. In this regard, the United States Supreme Court clearly affirmed that a "damage remedy against the offending party (especially when it is a public agency) is a vital component of any scheme for vindicating charged constitutional rights ..." Owens v. City of Independence (1980) 445 U.S. 622, 651, 100 S.Ct. 1398, 1415-1417. (Parenthesis added.)

Although briefed by Seascape, the decision of the Court of Appeal did not consider and does not mention the Federal Civil Rights Act, 42 U.S.C. §1983, which provides a damage remedy. Seascape is entitled to monetary damages as provided in the lower court Judgment. The County refused to exercise the option to provide additional densities as set forth in the Trial Court Judgment. Said Judgment specifically provided that, if the County did not exercise the alternate as

therein specified, the County must pay monetary damages as set forth therein.[4] CT 2012, L. 28- 2013, L. 6.

D. Seascape is entitled to Recover Costs, including Experts' Fees and Attorney's Fees, against the County of Santa Cruz.

The Trial Court Judgment, provided, inter alia, the County with the option to allow higher densities. Yet, the County chose not to exercise that option and, according to the lower court Judgment, monetary damages were awarded. CT 2010-2012. The Trial Court Judgment further provided that, regardless of

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fn.4. "Just compensation" mandated by the United States Constitution requires, inter alia, certainty, a full equivalent, and monetary compensation. Fifth and Fourteenth Amendments of the United States Constitution. Neither higher densities nor, for that matter, invalidation are "just compensation". Further neither can be used to avoid a taking. The State courts must yield to the federal constitutional requirements including "just compensation". City of Oakland v. Oakland Raiders, supra. Moreover, in light of this factual situation involving a series of actions and inactions by the County over a lengthy period of time, invalidation is obviously no remedy at all.

whether monetary damages or higher densities were chosen by the County, the landowner was awarded costs of suit, including experts' fees and attorney's fees. CT 2012, L. 11-14. The Court of Appeal ordered, inter alia, that the County grant Seascape higher densities, but directed that each party bear its own costs. CA 20 and 31.

Costs of suit including attorney's fees on both the trial court and appellate court levels and experts' fees should be awarded to Seascape. Sections 1021.5 and 1036 of the Code of Civil Procedure, and each section; 42 U.S.C. §1988. Further, the Attorney's Fees Award Act evidences a clear legislative intent that costs of suit including experts' fees and attorney's fees must be awarded Seascape. 42 U.S.C. §1988; Bonnes v. Long (1979) 599 F.2d 1316, 1319; Johnson v. State of Mississippi (1979) 606 F.2d 635, 637-639; Kimbrough v. Arkansas Activities Assoc. (1978) 574 F.2d 423.

IV

OTHER ERRORS

Seascape respectfully notes several other errors in the decision of the Court of Appeal. Seascape alleged and proved and the trial court found and determined after an extended court trial that, as a result of a series of actions and inactions of the County over a lengthy period of time, the County of Santa Cruz violated the Constitutional rights of Seascape and a taking had occurred. e.g., see First Amended Complaint, CT 71 and 76-77; Findings of Fact No. 36 and 37, CT 1989; Conclusions of Law No. 1, CT 1999. The reviewing court may not substitute its deductions for those of the Trial Court, particularly here in view of the court trial of many days. Campbell v. Southern Pacific (1978) 22 C3d 51, 60. Nevertheless, the Court of Appeal decision categorizes this matter as a "mere" rezoning case. See CA pages 3 and 19. Such categorization is incorrect and constitutes error.

In addition to the above, the Court of Appeal, incorrectly, asserts that there was no taking based, specifically, on the erroneous premise that County ordinances permitted the granting of compensating higher densities to Seascape. CA 19-2 . First, even assuming arguendo that such ordinances did permit the granting of compensating densities to Seascape, which they did not, the Trial Court, after considering extensive oral documentary evidence during many days of trial, clearly found and determined that the County had blatantly demonstrated a continuing and absolute unwillingness to provide Seascape with any compensating densities, whatsoever, as evidenced by the County's actions and inactions over a period of time. E.g., Findings of Fact Nos. 22, 23, 25 and 31; CT 1987-1988. Further highlighting the County's obstensity is the refusal by the County to exercise its option to accept the alternate judgment providing for higher densities rather than a money judgment. Not only is the trial court Judgment presumed to be correct, but

any conflict must be resolved in favor of the same. Moreover, a "reviewing court is without power to substitute its deduction for those of the Trial Court". Campbell v. Southern Pacific (1978) supra., 60.

Second, the Trial Court having considered the County ordinances and conduct in the crucible of an actual facts situation, properly made its determination. This must be followed in the appellate review process. Campbell v. Southern Pacific (1978) supra.

Third, even viewing the naked County ordinances disassociated from this factual situation, the County created an impediment to the provision of higher densities to the landowner. For example, the County specifically required in its own ordinance that, in order to grant a PUD in a UBS zone district, the standards and densities must be consistent" with the Aptos Plan. Section 13.04.306c of the County Ordinances; Exhibit CC, CT 3042. The earlier 1967 Aptos Area Plan placing the subject property in permanent open space for the benefit of the public called for the

creation of the new PLANNED COMMUNITY DISTRICT as a mechanism to provide compensating higher densities. Yet, no such Planned Community District was ever formed by the County. RT I, 25-26, L. 6; RT XV, 168, L. 16- 169, L. 9. Confirming that which the County had earlier effectuated, the 1974 Aptos Area Plan not only designated the subject 70 acres as "park-playground" (the same designation used for State owned parks), but also made no provision whatsoever for compensating higher densities. RT I, 216; RT VII, 73, L. 21-23. This merely fortifies the earlier adopted County Parks and Open Space (PROS) Plan recommending for "immediate action" the public acquisition of the subject Seascape beach. CT 2316; CT 2307 and RT I 167 and 172. Furthermore, shortly before placing the UBS-50 (Unclassified-minimum Building Site per unit = 50 acres) zone on the subject property, the County, in a discussion involving the Board of Supervisors and the Santa Cruz Planning Director (Monasch), confirmed the elimination of any potential for

compensating higher densities with respect to the subject 70 acres, even through the PUD process. CT 2333; RT I 216-218 and 223; RT IV 94, L. 2-23.

The County rejected Seascape's earlier residential land application on the subject property, Tract 553, Unit no. 7; the County, through the rezoning process, eliminated Seascape's submitted land use proposals involving the subject property in the Goetz Plan and Eckbo EIR; the County rejected its own Planning Staff and Planning Commission's recommendation of 200 to 250 compensating higher densities (in return for placing the subject 70 acres into permanent open space); the County rejected the concept of compensating higher densities and Seascape has never received any compensating higher densities. RT I, 218-223; II 179, L. 13-19; II 188, L. 15-21; II 143, L. 21- 144, L. 12; RT IV 99, L. 4- 100, L. 1; VII 111, L. 4-8; RT XV 152, L. 4-6; RT XV 167 L. 3-5; RT I 139, L. 9- 143, L. 22; Exhibit la, CT 2264; CT 2293; RT II 18, L. 13-20; RT VIII 107, L. 1- 111, L. 11. The subject property, as a

result of the conduct of the County over a number of years, has no value, whatsoever, to the private landowner; it is not saleable; it does not in any add value to any of Seascape's other properties; and there is no economically viable use left in the subject property. RT I 182-184; RT I 218-219, L. 6; RT I 223; RT IV 99 and 125; RT II 245, L. 4-25; RT II 249, L. 19-23; RT XV 93, L. 16- 94, L. 21; RT XV 152, L. 16-23; RT IV 9, L. 12- 10, L. 4; RT IV 107, L. 13-19; CT 1987 and 1999.

As stated by County Supervisor Forbus, concerning the plight of Seascape and the utter devastation visited upon it by the County conduct:

> .... Just a couple of more sentences here, I think that you know, a pendulum swings back and forth, it never stops in the middle, it is never on one side or the other, and it has swung so completely that the only place that a property owner or a man who owns anything has a place to get redress now is in the courts.

Minutes of the Board of Supervisors, CT 2333, last paragraph; CT 2292.

Respectfully submitted,

January 31, 1983.

ADAMS, LEVIN, KEHOE,
BOSSO, SACHS & BATES
A Professional Corporation

/s/ DENNIS J. KEHOE,
DENNIS J. KEHOE,
Attorney for APTOS SEASCAPE CORPORATION

APPENDIX G

CLERK'S OFFICE, SUPREME COURT
4250 State Building

San Franscisco, California 94102

APR 20 1983

I have this day filed Order HEARING DENIED

/s/ Richardson, Kaus, Brousard, JJ OF THE OPINION

THAT THE PETITION SHOULD BE GRANTED.

In re: 1 Civil No. 46963

Aptos Seascape Corp.

vs.

County of Santa Cruz et al.

Respectfully,

Clerk

G-1.

APPENDIX H

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CRUZ

50142
CASE NUMBER

APTOS SEASCAPE CORPORATION, etc.

Plaintiff(s)/ Cross-Defendant,
Respondent-Cross-Appellant,

vs.

THE COUNTY OF SANTA CRUZ, et al.,

Defendant(s)/ Cross-complainants,
Appellants-Cross-Respondents.

NOTICE OF ENTRY OF REMITTITUR

To the above named parties and to their attorneys of record:

You are hereby notified that a remittitur has been issued in the above entitled matter pursuant to Rule 25 of the California Rules of Court and the remittitur was entered on 4-26-83.

RICHARD W. BEDAL, COUNTY CLERK

BY /s/ Kenni Lopes
Deputy Clerk

CERTIFICATE OF MAILING

I, RICHARD W. BEDAL, County Clerk and Clerk of the Superior Court of the State of California for the County of Santa Cruz, and not a party to the within action, hereby certify; that on 5-2-83, I served notice of entry of Remittitur on the parties in the within action, by depositing true copies thereof, enclosed in sealed envelopes with postage prepaid in the United States Post Office mail box at Santa Cruz, California addressed as follows:

Dennis J. Kehoe
Adams, Levin, Kehoe, Bosso,
Sachs & Bates
323 Church Street
Santa Cruz, CA 95060

Clair A. Carlson
County Counsel
701 Ocean Street
Santa Cruz, CA 95060

T. Roy Gorman
Chief Counsel
California Coastal Commission
631 Howard Street
San Francisco, CA 94105

DATED: 5-2-83

RICHARD W. BEDAL, COUNTY CLERK

By _____
Deputy Clerk

NOTICE OF ENTRY OF REMITTITUR

APPENDIX I

Dennis J. Kehoe
Adams, Levin, Kehoe, Bosso, Sachs & Bates
A Professional Corporation
323 Church Street
Santa Cruz, CA 95060
Telephone 426-8484

Attorneys for APTOS SEASCAPE CORPORATION.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

Case No. A012759

Old No. 1 Civ. 46963

(Santa Cruz County

Superior Court No. 50142)

APTOS SEASCAPE CORPORATION,

Plaintiff, Cross-Defendant
Respondent and Cross-Appellant,

v

THE COUNTY OF SANTA CRUZ, et al.,

Defendants, Cross-Complainants
and Appellants

_____/

FILED
JUL 12 1983
Court of Appeal - First App. Dist.
By CLFFOD C. PORTER, Clerk

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN, that APTOS SEASCAPE CORPORATION, Appellant, (Plaintiff, Cross-Defendant, Respondent and Cross-Appellant below) hereby appeals to the United States Supreme Court from those portions, only, of the final Judgment herein reversing the trial court Judgment awarding Aptos Seascape Corporation damages, costs, and fees in inverse condemnation and affirming, with modification, the trial court Judgment dismissing Aptos Seascape Corporation's Second Cause of Action for, inter alia, declaratory relief, damages and other relief; and each of the foregoing portions thereof. (No appeal is taken from the other portion of the Judgment herein affirming the trial court Judgment in favor of Aptos Seascape Corporation on the Cross-Complaint of the County of Santa Cruz.)

Said portions of the Judgment herein and the entire Judgment, itself, herein did not become final until after Petitions for Rehearing were denied and

Petitions for Hearing by the California Supreme Court were denied on April 20, 1983 and, thereafter, the Remittitur by the Clerk of the Court of Appeal was entered on April 25, 1983. The decision of this Court of Appeal was initially entered (filed) on December 23, 1982.

This Appeal is taken pursuant to 28 United States Codes Section 1257(2).

DATED: July 12, 1983.

APTOS SEASCAPE CORPORATION

BY: ADAMS, LEVIN, KEHOE
BOSSO, SACHS & BATES
A Professional Corporation

By: /s/ Dennis J. Kehoe
DENNIS J. KEHOE
Attorneys of Record for
APTOS SEASCAPE CORPORATION

323 Church Street
Santa Cruz, CA 95060
Telephone: (408) 426-8484

CERTIFICATE OF SERVICE BY MAIL

I, DENNIS J. KEHOE, declare:

That I am a citizen of the United States and resident or employed in Santa Cruz County, California; that my business address is 323 Chruch Street, Santa Cruz, California 95060; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am the attorney of record for Aptos Seascape Corporation, and I am a member of the Bar of the United States Supreme Court; that on July 12, 1983, I deposited in the United States post office mail box in the above-entitled action, in an envelope bearing the requisite first class postage, a copy of:

Notice of Appeal to the Supreme Court of the United States on the County of Santa Cruz and California Coastal Commission addressed to:

Peter Townsend
P.O. Box 7420
San Francisco, CA 94120

T. Roy Gorman, Chief Counsel
California Coastal Commission
631 Howard Street
San Francisco, CA 94150

Honorable Roland K. Hall
Judge of the Superior Court
701 Ocean Street
Santa Cruz, CA 95060

County Counsel
Santa Cruz County
701 Ocean Street
Santa Cruz, CA 95060

Attorney General of the
State of California
Attn: Linus Masourelis
Richard Jacobs
6000 State Building
San Francisco, CA 94102

Santa Cruz County Clerk
701 Ocean Street
Santa Cruz, CA 95060

at their last known address, at which place there is service by United States mail. This service is pursuant to Rule 28.

This Certificate is executed on July 12, 1983 at Santa Cruz, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Dennis J. Kehoe
DENNIS J. KEHOE

APPENDIX J

PERTINENT COUNTY ORDINANCES

13.04.306 Planned Unit Development Site Area - Development Standards - Density.

a. Development Standards. Development standards for site area and dimensions, site coverage, yard spaces, heights of structure, distances between structures, off-street parking and off-street loading facilities and landscaped areas shall, in the aggregate, be at least equivalent to the standards prescribed by the regulations for the district in which the planned unit development is located.

b. Density. The average number of dwelling units per developable acre shall not exceed the maximum number of dwelling units prescribed by the site regulations or the site area per dwelling unit regulation for the district in which the planned unit development is located subject, however, to the exception that the average number of dwelling units per developable acre may exceed the

maximum number of dwelling units prescribed for a district by not more than 10% in a planned unit development on a site of ten acres or more.

c. Exception. The development standards and density requirements of subsections (a) and (b) above shall not apply in the "U-BS" Districts wherein the standards and density must be consistent with the applicable General Plan as determined by the Planning Commission, or Board, as the case may be. (Ord. 1714, Sec. 2, May 9, 1972)

13.04.323 Action by the Zoning Administrator. The Zoning Administrator may grant an application for a use permit as applied for, or in modified form, if on the basis of the application and the evidence submitted, the Zoning Administrator makes the following findings:

a. That the proposed location of the conditional use is in accordance with the objective of the zoning ordinance and the purposes of the district in which the site is located.

b. That the establishment, maintenance or operation of the use or building will not, under the circumstances of the particular case, be detrimental to the health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of the proposed use or be detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the County.

c. In the event that the proposed use of the property is in an Unclassified Zone, the Zoning Administrator shall make the additional finding that the proposed use is in keeping or consistent with the objectives of the Zoning Ordinance and those of the General Plan of the Planning area, if any, in which the proposed use is to be established, and with the objectives of the Countywide General Plan. (Ord. 758, Sec. 2 part, February 19, 1962; Ord. 1704, Sec. 20, April 25, 1972)

13.04.250.15 Planned Development Site Area - Development Standards - Density - Housing Types.

a. Development Standards. Development standards for site area and dimensions, site coverage, yard spaces, heights of structure, distances between structures, off-street parking and offstreet loading facilities and landscaped areas shall in the aggregate be at least equivalent to the standards prescribed by the regulations for the district in which the planned development is located.

b. Density. The average dwelling unit per net acre shall not exceed the maximum population density prescribed by the site area regulations.

c. Mixing of Housing Type. A planned development may include a combination of different dwelling types which complement each other and harmonize with existing and proposed land uses in the vicinity. (Ord. 1578, Sec. 27, Feb. 23, 1971; Ord. 1704, Sec. 11, Apr. 25, 1972; Ord. 1746, Sec. 3, July 18, 1972)

ORDINANCE NO. 1800

AN ORDINANCE AMENDING THE ZONING ORDINANCE OF THE COUNTY OF SANTA CRUZ, CHANGING CERTAIN PROPERTY FROM ONE ZONING DISTRICT TO ANOTHER IN VICINITY OF:

(Seascape-La Selva Coastal Area (Bounded on north by Hidden Beach and south by Manresa State Beach)

The Board of Superviosrs of the County of Santa Cruz, State of California, does ordain as follows:

1. Chapter 13.04 of the Santa Cruz County Code, State of California, being the Zoning Ordinance of the County of Santa Cruz, is hereby amended by amending Sectional District Map/s Nos. 13.04.100-20, 28, 29 and 33,T11S, R1W - Map Nos. 416, 433, 432 & 445, respectively.

to change that property shown on the attached diagram FROM THE:

Various interim U-BS, Residential and Agricultural

Districts TO THE;

R-1-6 PD, and various U-BS, Districts as shown on Exhibits A & B in the Planning Department

2. This ordinance shall take effect 30 days from and after the date of its adoption.

PASSED AND ADOPTED this 5th day of December 1972, by the following vote:

AYES: SUPERVISORS MELLO, SANSON, HARRY

NOES: SUPERVISORS FORBUS, CRESS

ABSENT: SUPERVISORS NONE

/s/ Philip Harry
Chairman of said Board

ATTEST: /s/ Tom Kelly
Clerk of said Board

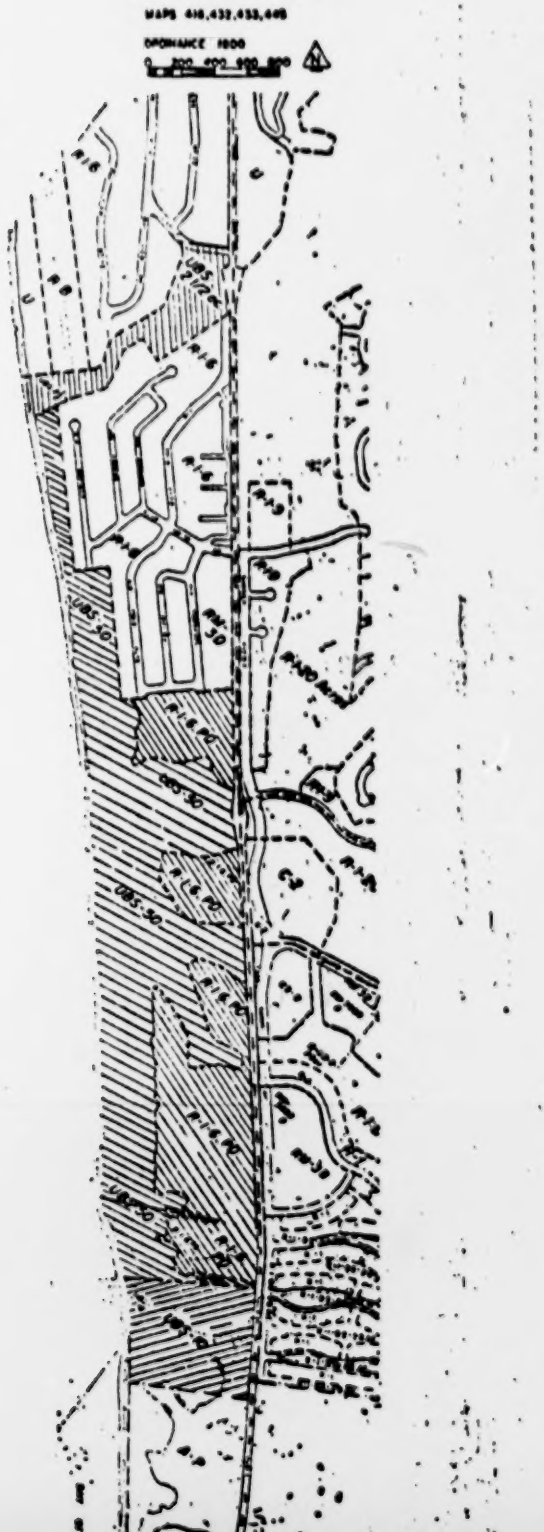
Distribution: County Counsel
Planning Department
Santa Cruz Sentinel

Approved as to form: /s/ C A Carlson
Clair Carlson, Chief
Deputy County Counsel

REF: Planning Commission Recommendation 90-72
File No ____

PUBLIC NOTICE PUBLIC NOTICE

AMENDED
ZONING PLAN,
SECTIONAL DIST. MAP
1304100, EST II S, R1E



NO. 83-91
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

APTOS SEASCAPE CORPORATION,
a California corporation,

Appellant,

vs.

THE COUNTY OF SANTA CRUZ, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

APPELLEES' MOTION TO DISMISS OR AFFIRM

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County of Santa Cruz, et al.

The Brief Shop • Legal Printers • (213) 877-8620

QUESTIONS PRESENTED

1. Whether the questions raised are ripe for judicial determination by this Court.

2. Whether the appeal presents a substantial federal question since the judgment rests on an adequate non-federal basis.

3. Whether the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on.

PARTIES TO THE PROCEEDING

The parties are Aptos Seascape Corporation, a California corporation (Seascape), Appellant; the County of Santa Cruz, Board of Supervisors of the County of Santa Cruz and the Planning Commission of the County of Santa Cruz (collectively, the County), Appellees; and the California Coastal Commission as Amicus Curiae in the proceedings below.

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NO. 83-91

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vs.

THE COUNTY OF SANTA CRUZ, et al.,

Appellees.

APPELLEES' MOTION TO DISMISS OR AFFIRM

To the Honorable Justices of the United States Supreme Court:

Pursuant to this Court's Rule 16, Appellees hereby file this Motion to Dismiss the appeal filed by Appellant, Aptos Seascape Corporation (Seascape), on the grounds that it does not present a substantial question requiring plenary consideration and on the further ground that the Judgment of the California Court of Appeal rests on an adequate nonfederal basis. In the alternative, Appellees ask this Court to affirm the Judgment of the California Court of Appeal.

Appellant asked this Court to review this matter as if it were presented in a Petition for Writ of Certiorari. Appellees ask this Court, therefore, to treat this Motion to Dismiss or Affirm as if it were a Brief in Opposition to a Petition for Writ of Certiorari.

CONCISE STATEMENT OF JURISDICTION

Appellees submit the following corrections and clarifications of Appellant's "Concise Statement of Jurisdiction": (a) Appendix "B" does not include 18 Special Findings made by the Trial Judge on the inverse condemnation issues at the request of Appellees (See Clerk's Transcript [CT] 1971 through 1975, granting requests appearing from CT 1896 through 1910). (b) Appendix "D" does not include Appellees petition for rehearing in the California Court of Appeal. (c) Appendix "E" does not include Appellees' petition for hearing in the California Supreme Court nor does it include the amicus curiae brief of the California Coastal Commission in support of County's petition for hearing in said Court. (d) Appellant would have this Court believe that it has the votes of three California Supreme Court justices on its side in this case. This is attaching improper significance to a losing vote on all of the petitions for hearing. The petitions included a request for a hearing on the judgment in favor of Seascape on the cross-complaint for implied in law dedication. Exhibit "G" does not indicate that those who voted for a hearing wanted to hear the inverse condemnation or the cross-complaint causes to the exclusion of one or the other.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellees submit the following corrections and clarifications of Appellant's list of constitutional and statutory

provisions necessarily involved in this appeal: (a) 42 U.S.C. Section 1983 is not at issue and was never considered in the courts below. (b) Jurisdictional Statement Appendix (App. Jur. Statement) "J" does not include either the County ordinances relied on by the California Court of Appeal in overruling the trial court judgment or recent enactments affecting the property. See App. Jur. Statement, C-27 to C-28. The pertinent Santa Cruz County Code and ordinances omitted are:

1. *Section 13.04.305 Planned Unit Development* (Clerk's Transcipt [CT] 3042):

> "a. *Purpose.* In certain instances the objectives of this chapter may be better achieved by the development of planned units which do not conform in all respects with the land use pattern designated on the zoning map of the district regulations prescribed by this chapter. A planned unit development may include a combination of different dwelling types or a variety of land uses which complement each other and harmonize with existing and proposed land uses in the vicinity. In order to provide locations for well-planned developments which conform with the objectives of this chapter although they deviate in certain respects from the zoning map and district regulations, use permits for planned unit developments may be granted in accordance with Sections 13.04.305 to 13.04.308, inclusive, provided the developments comply with the regulations prescribed in this chapter.

b. *Districts.* A planned unit development may be located in any zoning district upon the granting of a use permit in accordance with the provisions of this Chapter.

c. *Permitted Uses.* A planned unit development shall include only uses permitted either as permitted uses or conditional uses in the zoning district in which the planned unit development is located, subject to the following exceptions:

1. Any use permitted in any residential or 'C-1' District either as a permitted use or a conditional use, or any combination of such uses may be included in a planned unit development on a site of ten (10) acres or more, located in an 'R-1', 'RR' or 'RM' District."

2. *Section 13.04.212-A Regulations for Commercial or "C" Districts. Conditional Uses. "C-1" Neighborhood Commercial Districts* (CT 2988-2989) provides, in part:

"a. The following conditional uses may be permitted in 'C-1' Neighborhood Commercial Districts upon the granting of a use permit in accord with the provisions of Section 13.04.320 et seq:

1. . . .

5. Hotels and motels . . .

10. One-family, two-family and multiple dwellings and grounds or combinations thereof when developed in accord with requirements of the 'RM-1000' District . . ."

3. *Section 13.04.195 Regulations for Multiple-Family Residential or "RM" District - Site Area per Dwelling Unit and Per Structure - Site Frontage - Site Width - Site Depth* (CT 2969) provides, in part:

"a. Site Area.

District	Minimum Site Area Per Dwelling Unit
'RM-1'	1,000 square feet . . ."

4. *Section 13.04.051 Elimination and Reclassification of Zones* (CT 2931) provides, in part:

"a. The following zone classifications existing prior to the effective date of this Section are eliminated and repealed, and on said date any land or property subject to said zone classifications is reclassified to the zone classification designated herein:

1. . . .

8. RM-1000 to RM-1 . . ."

5. *Section 13.04.110-D Depth through Dwelling Unit (Definitions)* [CT 2936] provides, in part:

"'Dwelling' - A one-family dwelling, multi-family dwelling or lodging house. For purpose of this definition, automobile trailers, hotels, motels, . . . shall not be deemed dwellings."

6. *Section 13.04.121 Regulations for Unclassified or "U" Districts. Permitted Use* (CT 2945) provides, in part:

"The following uses shall be permitted subject to the provisions of Section 13.04.300:

1. Any use permitted in the 'R-A', 'RR-1', 'RR-2', 'R-1', and Agricultural Districts except hog or mink farms . . ."

7. *Section 13.04.122 Regulations for Unclassified or "U" Districts. Conditional Uses* (CT 2945) provides, in part:

"The following conditional uses shall be permitted upon the granting of a use permit in accord with the provisions of Sections 13.04.320 et seq., and subject to the provisions of Section 13.04.300:

1. Uses which require a use permit in the 'R-A', 'RR-1', 'RR-2', 'R-1' and Agricultural Districts.
2. All permitted uses or uses requiring a use permit in the 'R-M', 'REC', 'C', or 'M' Districts.
3. Commercial hog farms or mink farms.
4. Labor Camps . . ."

8. Ordinance No. 3315, adopted November 23, 1982, renumbered Chapter 13.04 Zoning Regulations as Chapter 13.10.

9. Ordinance No. 3345, adopted November 23, 1982, provides, in part:

"SECTION I. The Sectional District Maps adopted pursuant to Section 13.10.130 are hereby amended by the changes in zone district names and rezoning from one zone district to another, as follows:

PREVIOUS DISTRICT NEW DISTRICT

Basic Zone Districts

'C-3' . . .

'U' Special Use 'SU' Special Use . . .

SECTION II. The Section District Maps adopted pursuant to Section 13.10.130 are hereby amended by deleting all of the following combining Zone Districts:

'Building Site (BS)' . . .

SECTION III. The Sectional Maps adopted pursuant to Section 13.10.130 are hereby amended to zone all parcels within the Coastal Zone Boundary shown on the Coastal Zone Rezoning Maps, Exhibit A, to the 'Coastal Zone (CZ)' combining district . . . ."

RAISING THE FEDERAL QUESTION

Appellees submit the following corrections and clarifications to Appellant's allegations regarding raising of the federal question: Appellant neither pleaded (CT 1 Complaint; CT 68, First Amended Complaint) nor proved a violation of the Civil Rights Act [42 U.S.C. Sections 1983 et seq.]. See App. Jur. Statement, B-1 to B-35, Findings of Fact; B-35 to B-39, Conclusions of Law; A-1 to A-12, Judgment. Appellant did not refer to the Civil Rights Act in its responses to County motions (CT 774, 827, 895, 992, 1418) or in its trial briefs (CT 1404, 1716). The trial court did not expressly or impliedly pass on the application of

the Civil Rights Act (App. Jur. Statement, "A" and "B"). Similarly, the Court of Appeal did not refer to the Civil Rights Act at all (App. Jur. Statement, C-1 to C-50). Appellant first raised the spectre of the Civil Rights Act in its reply brief in the California Court of Appeal, page 29.

STATEMENT OF THE CASE

The California Court of Appeal's summary of the facts in ***Aptos Seascape Corp. v. County of Santa Cruz***, 138 Cal.App.3d 484, 489-491 (1983) [App. Jur. Statement, C-2 to C-8] is more accurate than that of Appellant (Jur. Statement, C-2 to C-8). Appellant's Statement of the Case contains only argument, opinion, and conclusions of law inextricably intertwined with some selected facts that could be distorted so as to appear to support this appeal. In doing so, Appellant resurrects the trial court's findings based on an erroneous interpretation of the County laws. The trial court had found that the zoning of R-1-6-PD on a portion of the 110-acre parcel precluded the consideration of a Planned Unit Development to allow a greater density to compensate Seascape for not piling the grading debris on the beach to construct roads and lots (See Opinion, Jur. Statement, C-28). This legal conclusion adopted by the trial court which was the *sine qua non* for a finding of a taking by the County was expressly rejected by the Appeal Court (App. Jur. Statement, C-29). At page 13, Appellant cites ***Campbell v. Southern Pacific Co.***, 22 Cal.3d 51; 148 Cal.Rptr. 596, 583 P.2d 121 (1978) to suggest that the appellate court improperly overruled the trial court on this

question of law. ***Campbell*** rejected appellate court changes of facts found by a jury.

The Appellant goes further and seeks to conceal from this Court all of the pertinent ordinances which shows the trial court error (Jur. Statement, p. 11).

We will address Appellant's points under this heading to point out the more gross distortions.

Appellant's last sentence under the sub-heading "A", p. 7, erroneously concludes that the subject property had been given a zero density.

Under the sub-heading "B", pp. 7-8, Appellant erroneously suggests that the County can take private property for open space by means of excessive regulation. The statutes cited do not support this claim, nor do they excuse the County from proceeding under the Eminent Domain Law (Code of Civ. Proc. Sections 1230.010, et seq.). The last paragraph of "B" erroneously concludes that the County had acquired the subject property, a conclusion that was expressly rejected as a matter of law by the Court of Appeal (App. Jur. Statement, C-30).

Under the sub-heading "C", pp. 8-9, Appellant erroneously suggests that the County was unable to provide the so-called compensating densities in the absence of some unexplained "Planned Community District". The Court found that under the Sections of the County Code omitted from Appendix "J" by Appellant, e.g., 13.04.305; 13.04.212-A, subdiv. (a) pars. (5) and (10); 13.04.195, subdiv. (a); 13.04.051, subdiv. (a), par. (8); and 13.04.110-D, the County could still grant compensating densities if and when Seascape ever asks for them (App. Jur. Statement,

C-28). Appellant suggests that the Public Recreation and Open Space Plan (PROS) which was adopte[illegible]ter the date of the alleged taking in December 1972 required immediate action to acquire the beach. The PROS plan assigned a "low priority" to the acquisition (See Opinion, App. Jur. Statement, C-5). The PROS Plan and the 1974 Aptos General Plan were both adopted after the date of the so-called taking by adoption of Ordinance No. 1800 on December 5, 1972 (App. Jur. Statement, J-5 to J-6). The bluff and beach on Seascape's 110-acre parcel were placed in "Open Reserve" by the PROS Plan and in "Open Space-Recreation Scenic, Park-Playground by the 1974 Plan. A simple "Park-Playground" designation used by Appellant at pages 9 and 11 may give some support to its case, but is, at best, misleading (See Opinion, App. Jur. Statement, C-5).

Appellant's sub-heading "D", pp. 9-13 would have the Court believe that it exhausted its remedies by submitting a tentative map for Tract 553, Unit 7 some 21 months before the passage of Ordinance 1800. Tract 553 would have subdivided the whole of the 110 acres without regard to the so-called natural boundaries it now claims exist between the 40 acre benchland and the land below the 100-foot contour. Indeed, Tract 553 proposed the massive bull-dozing of the bluffs and benchlands to obtain fill to raise the beach some 16 feet for installation of a 4800-foot road where the beach used to be. Seascape's hypothetical development for purpose of valuation continued the concept of filling of the beach with debris from the uplands (Special Finding No. 98, CT 1908, 1975; Def.Exs. C, D, Reporter's Transcript, Vol. IV, p. 4 [RT IV 4]). The

parties and the trial court agreed that Tract 553 was properly denied. In the Reporter's Transcript (RT IX 153) the trial court, speaking of Tract 553, said, in the presence of the parties and without objection:

> "The Court: I haven't heard a single quarrel about turning that plan (Tract 553) down . . . they haven't stated that . . . the County did them wrong or anything."

Even if Appellant could claim that Tract 553 was a bona fide attempt to develop the property (which we do not concede), the Tract was disposed of long before the adoption of Ordinance 1800 and cannot be considered an exhaustion of remedies under that ordinance. After Ordinance No. 1800, Seascape was entitled to 290 units (40ac. x 7.25 units) on the still intact 110 acres (See First Amended Complaint [Complaint] CT 75). Without a development plan before it, the County was unable to guess how Seascape would propose to preserve the environment or to determine whether Seascape's proposed density for new construction should be offset by forebearance of construction on other parts of the parcel. This Court has already determined that preservation of the environment and open space is a proper concern of government (***Agins v. City of Tiburon***, 447 U.S. 255, 262, 100 S.Ct. 2138, 65 L.Ed.2d 106, 113 [1980] affirming 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1978).

Appellants state that the County could not extend its interim zoning more than two times (Jur. Statement, 10).

Section 65858 of the Government Code merely limits the total length of the time an interim zoning can be in

existence. It says nothing about the number of extensions that may be granted to achieve that length of time. Neither the trial court nor the Court of Appeal gave credence to Appellant's interpretation (App. Jur. Statement, A, B, C).

Seacape made no formal application other than Tract 553 on which the County could act (App. Jur. Statement, C-4). The Goetz Plan was not a formal application on which the County could act. The record is devoid of any evidence of the disposition of the Goetz Plan. It was not offered in evidence by Appellant and Mr. Baker, the Planning Director, testified that it just disappeared (RT VII 55, See Opinion, App. Jur. Statement, C-4). The Goetz sketch was not offered after adoption of Ordinance 1800.

The Court of Appeal observed that the Planning Director had answered a question about rights under a PUD with a response that applied only to Planned Development (PD) permits. Consequently, his response could only be categorized as ambiguous (App. Jur. Statement, C-20, Fn. 6). In spite of this clear holding, Appellant persists in making the flat, false statememt that the Board of Supervisors had been informed by the Planning Director that increased densities were impossible under a PUD permit and continues to cite this same ambiguous exchange as evidence that the Board of Supervisors did not intend to issue a PUD on the R-1-6-PD property (See Jur. Statement, 10).

Contrary to Appellant's contention, Section 65860 of the Government Code did not require that zoning ordinances conform to the local agency's general plan until January 1, 1974, more than two years after the adoption of Ordinance 1800 which allegedly took Seascape's property.

Section 13.04.323, subdiv. (c) does not require conformance with general plans in case of PUD permits in an R-1-6-PD zone on part of the 110-acre parcel. Subdivision (c) applies only in the "U", unclassified zone (App. Jur. Statement, J-3).

Sub-heading "J" contains other arguments which must stand or fall on the validity of the trial court's erroneous conclusion of law that County law absolutely precluded the consideration of increased density on the R-1-6-PD zoned portion of the 110-acre parcel in addition to the usual 7.25 units per acre which would yield 290 units (7.25 units/ acre x 40 acres) on that portion of the 110 acres (See Opinion, App. Jur. Statement, C-24, C-29).

In our argument, infra, we propose to respond to other arguments in this subdivision as well as those in Appellant's Statement of Reasons Why the Questions Presented are Substantial (Jur. Statement, 13-19).

SUMMARY OF ARGUMENT

Issues raised by Appellant are neither ripe for adjudication nor otherwise justiciable since the Court below found the County's laws to be neither facially unconstitutional nor unconstitutionally applied.

California's rule denying money damages for excessive regulation by a zoning ordinance is not properly before this Court since the Court below found that the County ordinances took no property.

A cause of action under the Civil Rights Act was neither timely nor properly raised. The cause was not litigated by the parties and was not expressly passed upon by either the trial or appellate court.

ARGUMENT

COUNTY'S LAWS ARE NEITHER FACIALLY UNCONSTITUTIONAL NOR HAVE THEY BEEN UNCONSTITUTIONALLY APPLIED TO SEASCAPE'S 110-ACRE PARCEL

The issue in the trial court was whether or not County had taken a part of Seascape's undivided 110-acre parcel by placing two zone designations on it. The beaches and bluffs which rise steeply from the beach to the 100-foot elevation, were placed in a zone (UBS-50 Acre) in which nearly any use is permitted provided a conditional use or planned unit development permit was obtained (Sections 13.04.121 and 13.04.122, County Code, supra, Ordinances). The site area of 50 acres required that the site for the use permit contain at least 50 acres, e.g., the entire beach and bluff area was to be the subject of one development permit. This zone carried out the requirement that use of the bluffs (palisades) be treated with the utmost care (1967 Aptos Plan, Pl.Ex.4A, RT I 116, CT 827-A33, 827-A37, 827-A40). The 1967 Aptos Plan provided that the no incompatible use be permitted on the beach. California cases have held that a local agency may restrict development of a beach to beach uses (*McCarthy v. City of*

Manhattan Beach, 41 Cal.2d 879, 884, 264 P.2d 932 (1953) cert. den., 348 U.S. 817, 75 S.Ct. 644, 99 L.Ed. 644.

Most of the 110-acre parcel lying above the 100-foot elevation was placed in an R-1-6-PD zone which generally permits 6,000 square foot lots with single family residences. Mathematically this would permit 7.25 units per acre or 290 units on the 40 acres (Appellant concedes 258 units—First Amended Complaint (Complaint) CT 75). Based on this Court's decision that a limitation of one house per acre in Tiburon was not a taking, the conclusion is inescapable that 258 units on 110 acres cannot be facially unconstitutional nor is such a restriction unconstitutionally applied. (*Agins v. Tiburon, supra,* 447 U.S. 255, at 263. The mathematics dictate a finding here that the County's ordinances were reasonable. It is not necessary to compare the utter lack of evidence of an intention to acquire Seascape's property, particularly when compared to local agency action in *Tiburon, supra*.

Here, the California Court of Appeal reversed the trial court judgment on the same ground stated by the United State Supreme Court in *Agins v. City of Tiburon, supra*, 447 U.S. 255, 262-263.

In the Opinion (App. Jur. Statement, C-30) the Court of Appeal said:

> "'At this juncture, [Seascape is] free to pursue [its reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied [its] the 'justice and fairness' guaranteed by the Fifth and

> Fourteenth Amendments. [Citation.]' (Fn. omitted.] *Agins v. Tiburon, supra*, 447 U.S. 255, 262-263.)"

The Court of Appeal also held that because the property of Seascape had not yet been dealt with at the development stage, e.g., no development plan had been submitted, it was impossible to determine whether Seascape would suffer an uncompensated loss by an unreasonable denial of use of the whole 110-acre parcel such that any part could be deemed to have been taken (Opinion, App. Jur. Statement, C-22). Appellant's case is untenable if the 110-acre parcel is not held to have been divided by the enactment of Ordinance 1800 because it is familiar law that mere diminution of value is not a taking of property. ***Penn Central Transportation Co. v. New York City***, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) and cases cited therein. See also ***HFH, Ltd. v. Superior Court***, 15 Cal.3d 508, 125 Cal.Rptr. 365, 542 P.2d 237 (1975) cert. den. 425 U.S. 904.

The Court of Appeal cited with approval ***American Sav. & Loan Ass'n v. County of Marin*** (9th Cir. 1981) 653 F.2d 364 wherein it was held that it could not be determined whether a parcel was taken by diverse zoning of parts thereof until there was evidence of how the property was treated at the development stage by local authorities. See Opinion, App. Jur. Statement, C-22.

The Court of Appeal has also held that Ordinance 1800 gave the County the power to give densities greater than the 258 or 290 units mathematically available on the R-1-6-PD zoned property through use of a PUD permit. Appellant has hidden the County Code Sections which that Court held permitted this flexibility (Opinion, App. Jur.

Statement, C-28). As a matter of law (and common sense) the discretion is in the County. Until Seascape asks for a determination of density based upon a development plan, the County cannot be expected to guess at what Seascape wants to do. This case is not ripe for judicial intervention before the County has a chance to see development plans of some sort. As in ***San Diego Gas Co. v. San Diego***, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981), the result of this litigation is that it is now up to Seascape to produce some development plans that show what it wants to do. Until a permit is applied for, we will never know how the County proposes to balance the public interest in preserving the environment and natural land forms and Seascape's desire to build houses on the beach.

Seascape relies heavily on the overruling of California's rule regarding money damages where an ordinance has so restricted the use of property so as to remove all reasonable use thereof. It hopes that the newest justice will join the three dissenters in the ***San Diego case, supra.*** However, we contend that even if the rule suggested by the dissent of Mr. Justice Brennan is adopted by the Court in a proper case, it will do Seascape no good. The dissent would give the County the opportunity to repeal any action considered to be a taking and leave judgment only for the interim damages suffered by the property owner during the improper restriction. Here, Seascape has produced no plans to use the property. Indeed, from 1971 through 1979, Seascape could not have developed the property if it wanted to because of a sewer moratorium (Special Findings No. 15, CT 1895, 1972, No. 20, 1896, 1972; Def.Exs.M, M-2, M-3, M-4, M-5, M-6 [RT X 12]).

Because of Seascape's stubborn refusal to make plans for use of its property, the laws on which this litigation was based are no longer in effect and the appeal is thereby moot. The beach and bluff part of the 110-acre parcel are no longer in the UBS-50 acre zone. Ordinance No. 3345 (Item 9, supra, Ordinances Involved) has designated the property in a SU-SZ, Special Use, Coastal Zone district. The Special Use zone district permits the same uses as a "U" zone, but the SZ zone makes the property subject to the land use plan of the Local Coastal Program (LCP) mandated by the Coastal Act of 1976 (Sections 30000 et seq., Pub. Resources Code). The County has complied with the Coastal Act of 1976 and now has a certified LCP which covers the the Seascape property (Sections 30500, 30512.1, Pub. Res. Code) and is now the administering authority of such LCP in this County (Section 30519, Pub. Res. Code). Appeals from County decisions are taken to the California Coastal Commission whose decision is final (Section 30603, Pub. Res. Code).

Even a casual reading of the Coastal Act of 1976 makes it readily apparent that County's control of development in the Coastal Zone (Seascape's property is within that zone—Special Finding Nos. 40, 47, 53, 54, CT 1899-1901, CT 1972) has been pre-empted by the State. The State must certify and approve the LCP, the State Commission makes the final decision on appeals.

The Coastal Act of 1976 is the legislatively approved implementation of the California Coastal Zone Conservation Act of 1972 (Sections 27000 et seq. Pub. Res. Code) which was adopted by initiative in November, 1972 prior to the adoption of Ordinance 1800 by the County. Cases

interpreting that Act have clearly established that the policy of the State is to protect the diminishing resources of the Coastal Zone.

In ***Georgia Pacific Corporation v. California Coastal Commission***, 132 Cal.App.3d 678, 183 Cal.Rptr. 395 (1982) the Court held that the Coastal Commission could require dedication of a sandy beach as a condition of a coastal development permit. In ***Associated Home Builders v. City of Walnut Creek***, 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606 (1971), app. dism. 404 U.S. 878, 92 S.Ct. 202, 30 L.Ed.2d 159, 43 A.L.R.3d 847, the Court held that a local government could require a property owner to dedicate park land as a condition of government approval for development of property.

Thus, any ruling by this Court on the laws applicable in 1972 or in 1982 would have no effect on Seascape's rights to develop its property under present laws. Until a case has been tried evaluating County's administration of those laws as applied to a concrete development proposal, there is no controversy ripe for judicial review in this Court.

THE ISSUE OF WHETHER OR NOT THE CALIFORNIA RULE DENYING MONEY DAMAGES FOR EXCESS REGULATION BY A ZONING ORDINANCE IS CONSTITUTIONAL IS NEITHER RIPE FOR ADJUDICATION NOR OTHERWISE JUSTICIABLE IN THIS CASE.

This Court should not review the California rule that refuses to award money damages even where zoning

regulations are too strict in the context of this case where it was determined that the ordinances were not so strict as to be considered a taking. This case is on all fours with *Agins v. City of Tiburon, supra*, 447 U.S. 255, at 262-263 where this Court found that a California Supreme Court finding that there had been no taking was sufficient to validate a Tiburon ordinance. Here, we have the same situation. Although the Court of Appeal stated that it was constrained to follow the rule regarding money damages propounded in *Agins, supra,* 24 Cal.3d 266 (App. Jur. Statement, C-15) it did go on to find that the ordinances do not constitute a taking.

The Court's reference to a condition on dismissal of the count for declarative relief and referring to compensating higher densities must be considered as an attempt to channel future controversies, if any, into the trial court for resolution on a timely basis. The expression does not suggest that the Court considered the ordinances to be a taking, particularly in the light of the express finding to the contrary which the Court had spent some time to explain.

APPELLANT FAILED TO RAISE AN ISSUE OF VIOLATION OF THE CIVIL RIGHTS ACT IN EITHER A TIMELY OR PROPER FASHION.

Appellant first raised the issue of a violation of the Civil Rights Act (42 U.S.C. Sections 1983, et seq.) in its reply brief in the Court of Appeal (Resp. Reply Brief, 29). As a consequence, the issue was never framed in a form which

would permit the parties to litigate the issues peculiar to that cause of action. Similarly, neither the trial court nor the appellate court were able to pass expressly on that issue.

CONCLUSION

For the foregoing reasons, Appellees respectfully urge this Court to dismiss the Appeal and/or affirm the decision of the California Court of Appeal and further refuse to issue the alternative writ of certiorari in this case.

Respectfully submitted,
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County Counsel,
County of Santa Cruz,
State of California.

Attorney for Appellees.

NO. 83-91

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

APTOS SEASCAPE CORPORATION,
a California corporation,

Appellant,

vs.

THE COUNTY OF SANTA CRUZ, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

RESPONSE IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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RESPONSE IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

I.

THE MOTION OF APPELLEES TO DISMISS THE APPEAL OR AFFIRM THE STATE COURT JUDGMENT MUST BE DENIED.

1. The Violation Of The Civil Rights Act Not Only Was Properly Raised, But Clearly Proven By Seascape.

Seascape has always stressed that its federal constitutional rights were violated by the County, beginning with

the administrative process and continuing through the pleadings, the trial, and the State Court and Federal Appellate processes. E.g., CT (Clerk's Transcript) 1-17; CT 68-89; CT 1404-1426; CT 1763; Seascape's Appellate Reply Brief; Seascape's Petition for Hearing, Appendix D; Seascape's Petition for Hearing to the California Supreme Court, Appendix F.

Furthermore, the Judgment of the trial court must, by law, be affirmed when it is supported by any legal theory, regardless of the theory advanced at trial. ***Leboire v. Royce*** (1950) 100 Cal.App.2d 610, 615, 224 P.2d 106. Seascape has clearly proven and the trial court has clearly found and determined the essential elements demonstrating an obvious violation of the Federal Civil Rights Act, 42 U.S.C. §1983. See ***Gomez v. Toledo*** (1979) 446 U.S. 635, 638, 100 S.Ct. 1920, 1922; see also Appendix B (Trial Court's Findings of Fact and Conclusions of Law) filed with the Jurisdictional Statement, page B-15, paragraph 25; page B-17, paragraph 35; pages B-17-18, paragraph 36; pages B-18-19, paragraph 37; pages B-35-37; Clerk's Transcript (CT) 1764, for example.

Moreover, Seascape pointed out the violation of 42 U.S.C. §1983 in all the appellate briefs including the initial Reply Brief of Seascape filed with the Court of Appeal (pages 29, 42, 69-70), Seascape's Reply Brief to the Amicus Brief (pages 17-18), the Petition for Rehearing filed by Seascape with the Court of Appeal (pages 3-4, Appendix D), and Seascape's Petition for Hearing filed with the California Supreme Court (pages 10-13, Appendix F). Thus, the County's argument has no merit, whatsoever.

2. The State Court Judgment Is A "Final" Judgment Pursuant To 28 U.S.C. §1257 And Mandates A Review Of This Nationwide Federal Issue.

A. The "Finality" of a Judgment is not Administered by this Court in a Mechanical Fashion.

28 U.S.C. §1257 indicates that this Court may review "final" judgments or decrees rendered by the highest court of the land. Nevertheless, this rule has *not* been administered in a mechanical fashion and there are circumstances in which there are departures from this finality for Federal Appellate jurisdiction. ***Cox Broadcasting Corp. v. Cohn*** (1975) 420 U.S. 469, 477. Furthermore, "(t)here are now at least four categories of such cases in which this Court has treated the decision of the federal issue as a final judgment for purposes of 28 U.S.C. §1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower State Court." *Ibid.*, page 477. [1/]

B. The Seascape Judgment is a "Final" Judgment since There are no Further Lower State Court Proceedings Pending.

1/ In any event and even had there not been a "final" judgment (which there is), several of the exceptions would apply.

In *San Diego Gas and Electric v. City of San Diego* (1981) 450 U.S. 621, 67 L.Ed.2d 551, 101 S.Ct. 1287, four Justices of this Court, with whom Justice Rehnquist concurred, concluded that this Court lacked jurisdiction and, therefore, again did not reach the issue of whether a state must provide a monetary remedy to a landowner whose rights under the Just Compensation Clause of the Fifth Amendment have been violated. *Ibid.*, p. 623.

Briefly, in *San Diego Gas and Electric*, the landowner never applied for a land development. *Ibid.*, pp. 629-630. 2/ Nevertheless, the determination of the trial court concluding that the Just Compensation Clause of the Fifth Amendment had been violated was affirmed by the State Court of Appeal in an opinion originally certified for publication. *Ibid.*, pp. 627-628. Subsequent to that ruling, the California Supreme Court remanded the matter back to

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2/ Here, Seascape has made repeated efforts to use its land through, inter alia, not only a request for approval of a subdivision map, but also through the rezoning process and the submittal to the County of the Goetz Development Plan and the Eckbo Environmental Impact Report (EIR). Jurisdictional Statement, pages 9-13; Court of Appeal Decision, Appendix C, pages 4-5. Even County Supervisor Forbus admitted that ". . . this is probably one of the most studied areas that we (the County) have . . ." Appendix K, attached hereto, CT 2333.

The County argues that Seascape is on "all fours" with ***Agins v. Tiburon, supra***, Appellees' Motion, page 20. This is patently false. For example, in ***Agins***, the residential zone placed on the five acre parcel allowed from at least one (1) home on the five acres to up to five (5) homes thereon. Further, ***Agins*** had never sought any approval for the development of the five acres. In Seascape, as mentioned above, the landowner has made repeated efforts to use the land, all to no avail. Even the Court of Appeal points out that all development of the subject property has been prohibited by the County. Appendix C, page 30.

the State Court of Appeal for a reconsideration in view of the then recent decision of the State Supreme Court in ***Agins v. Tiburon*** (1979) 24 Cal.3d 266, 157 Cal.Rptr. 372. *Ibid.*, p. 268. Thereafter, in an unpublished Opinion, the State Court of Appeal determined, inter alia, that there were purported unresolved factual issues in the record and remanded the case back to the trial court (Superior Court) for further legal proceedings. *Ibid.*, p. 629. Consequently, four Justices of this Court, with whom Justice Rehnquist concurred, determined that this Court lacked jurisdiction by stating, inter alia:

> "The logical course of action for an appellate court that finds unresolved factual disputes in the record is to remand the case for the resolution of those disputes. We therefor conclude that the Court of Appeal's decision contemplates further proceedings in the TRIAL COURT." (Emphasis added.)
>
> ***San Diego Gas and Electric v. City of San Diego, supra,*** p. 632.

In the Seascape case, the Judgment is a "final" judgment within the spirit and letter of the law since this case was *not* remanded back to the Trial Court of any resolution of purported factual disputes in the record. Consequently, this Court does have jurisdiction under 28 U.S.C. §1257.

C. The Judgment is "Final" within the Perview of 28 U.S.C. §1257 in that the Court of Appeal, in *Seascape*, Expressly Applied *Agins* and, in turn, the California State Supreme Court has Concluded that No Set of Factual Circumstances, No Matter How Severe, Can Ever Give Rise to a Fifth Amendment Taking.

In this case, the State Court of Appeal reversed the Judgment for inverse condemnation against the County based specifically on the State Court decision in ***Agins*** and, further, acknowledged that ". . . the United States Supreme Court may eventually conclude that California cannot limit the remedy available for taking to non-monetary relief . . ." Appendix C, Pages 14-15. Previously, the California Supreme Court mandated that *no* set of factual circumstances, no matter how severe, can ever give rise to a Fifth Amendment taking. ***Agins v. City of Tiburon*** (1979), ***supra***, page 273, affirmed on other grounds, 447 U.S. 255. Thus, Seascape was denied relief, as a matter of law, and Judgment is "final" as to the rejected constitutional theory. When a litigant is denied relief as a matter of law, the judgment is final within the meaning of 28 U.S.C. §1257. See ***Allenberg Cotton Co. v. Pittman*** (1974) 419 U.S. 20, 24-25; ***Windward Shipping, Ltd. v. American Radio Association*** (1973) 415 U.S. 104, 108.

D. Because of the Strangle Hold Emanating from the State Court Decision in *Agins*, California Has Improperly Insulated Itself from the Jurisdiction of the United States Supreme Court and the Federal Constitution.

The Court of Appeal decision specifically points out that the "County's zoning ordinances are complex and ambiguous, and the relationship among the various sections is confusing as is apparent from the conflicting testimony from various officials charged at various times with administration of these ordinances." Appendix C, page 29. The only confusion or conflict is created by the dichotomy between the County's conduct, in fact, and its conduct for purposes of litigation. For example, attached hereto is Appendix K, the dialogue between the Board of Supervisors (Sanson, the County Supervisor of the District in which the subject property is located) and the Planning Director (Monasch) wherein *no* credit can be given for the arroyos and beaches (the subject property) if the bench land, 43± acres are zoned R-1-6-PD (Planned Development), even if an application for a Planned Unit Development (PUD) is filed. In response, one of the County Supervisors (Forbus) pointed out that;

> ". . . just a couple more sentences here, I think that you know, a pendulum swings back and forth, it never stops in the middle, it is always over on one side or the other, and it is swung so

> completely that the only place a property owner or a man who owns anything has a place to get redress now is in the courts." Appendix K, attached, CT 2333.

Nevertheless, the Court of Appeal goes on to eliminate the award of all relief; the monetary relief, the Alternate Judgment and the recovery of litigation costs, and, then, refers to some sort of "compensating" densities. Appendix C, page 31. The reason for this not so subtle maneuver is the ***Agins v. Tiburon*** decision of the California Supreme Court.

The Court of Appeal (Appendix C, pp. 30-31), clearly emphasizes that all development of the subject property is prohibited and that it premises its ruling on some sort of "compensating" densities that may be provided at some indefinite time in the future. Clearly, there *is* a taking found by the Court, implicitly, in its ruling. The Just Compensation Clause of the Fifth Amendment requires just that; Just Compensation at the time of the taking and not the referencing of the landowner to some sort of amorphous "compensating" densities at some time in the indefinite future after jumping through another decade of mythical administrative hoops. As stated by this Court in ***United States v. Clarke*** (1980) 445 U.S. 253, 257, 100 S.Ct. 1127, 1130, an inverse condemnation action is the same as an eminent domain action except that the governmental agency is the defendant rather than the plaintiff. "The landowner is entitled to bring an action as a result of the 'self-executing haracter of the constitutional provision with respect to compensation'." *Ibid.*, p. 1130. Clearly, if this were an eminent domain proceeding, Just Compensation in the form of monetary relief would necessarily be provided

at this time by the agency to the landowner rather than dangling mirage-like "compensating" densities at some indefinite time in the future.

As pointed out in the JURISDICTIONAL STATEMENT, page 19, California is merely attempting to insulate itself from the jurisdiction of this Court and the United States Constitution. This mode of constitutional insulation will continue unless otherwise corrected by the United States Supreme Court.

The issues herein presented are of critical, nationwide importance. This Court's guidance and protection are needed not only by Seascape, but also by the citizens of California and other states. The judicial pingponging of the issues herein presented is not only extremely time consuming and expensive for Seascape, but also undermines the Federal constitutional rights of many citizens, who can ill-afford lengthy trials, pounds of appellate record and briefs, and a wistful hope that ". . . the right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is a 'personal' right . . ." protected by the United States Constitution as well as by the Civil Rights Act. ***Lynch v. Household Finance Corp.*** (1972) 405 U.S. 538, 552. [3/]

3/ The County's confusing, hodgepodge arguments are peppered with factual and legal errors, all of which are specifically denied. Nevertheless, since the errors are numerous and, in any event, not pertinent to the noting of probable jurisdiction, just a few of them are pointed out below. Further, upon the noting of probable jurisdiction, a detailed response can be made through briefing and/or oral argument.

a. Appellees incorrectly assert that the issue is merely whether a split zoning caused a taking (page 14); whereas, the trier of fact specifically determined that there was a taking without just compensation as a result of a series of actions and inactions over a period of time by the County. See Findings of Fact and Conclusions of Law of the Trial Court, paragraphs 33-37, Appendix B, pages 17-18, and paragraph 1, Appendix B, page 35.

3/ (cont.) b. The County, again, makes the misdirected argument that, since Seascape is the record owner of 110 acres and since some allegedly reasonable use is permitted on the 40 acres of bench land, it makes no difference whether the balance of the property was stolen. Motion, pages 15-16. The County made this argument with the Court of Appeal and the Court of Appeal rejected the same. Appendix C, pages 20-23. Further, the trier of fact specifically determined that, due to the County's conduct, the subject 70 acres are a de facto separate parcel. See Findings of Fact and Conclusions of Law, Trial Court, paragraph 2, Appendix B, pages 35-36.

c. County feebly argues that, since the U Zone (unclassified) has been relettered to "SU" (special use), the matter is moot; whereas, the underlying and controlling land use plan retains the subject property in permanent open space. County Motion, 13. The County is just "game-playing" in an attempt to obfuscate the already accomplished taking. "(T)he Fifth Amendment expresses a principle of fairness and not a technical rule of Proedure . . ." *United States v. Dickinson* (1947) 331 U.S. 745, 748. The case is not moot. The landowner has incurred substantial, uncompensated damages because of the violation of its federal constitutional rights.

d. Concerning the sewer moratorium referred to by the Appellee, page 17, the same is merely a smoke screen to, again, hide the confiscatory conduct of the County. The trial court analyzed this and made a specific finding pointing out that the taking resulted from the County's long-term conduct, and not from the moratorium. E.g., see Finding of Fact, paragraph 29, Appendix B, pages 15-16.

e. Appellees' reliance on *McCarthy v. Manhattan* (1953) 41 Cal.2d 879 (pg. 14-15) is as misplaced as it is preposterous. For example, in *McCarthy*, the trial court made findings that the public had used the property for 9 years (*Id.*, p. 893) and that the landowner submitted *no* evidence of the impact of the zoning ordinance on the property value and use. (*Id.*, p. 891) In Seascape, the trial court specifically determined that the public has *no* easements because of public use (e.g., Appendix B-39, paragraph 13) and, as a result of the County conduct, Seascape has been deprived of all economically viable use of its subject land. (E.g., Appendix B-35, paragraph 1.)

II.
CONCLUSION

Seascape respectfully submits that Appellees' Motion must be denied and that probable jurisdiction or the Petition for Writ of Certiorari should be granted.

ADAMS, LEVIN, KEHOE,
BOSSO, SACHS & BATES

DENNIS J. KEHOE
Attorneys for Appellant

APTOS SEASCAPE CORPORATION

APPENDIX K

Portion of Official Records of County of Santa Cruz Board of Supervisors, November 28, 1972:

SANSON: ". . . Well, let me ask this of the Planning Department. If this were to come in as a Planned Unit Development would there be any credit given under the Planned Unit Ordinance for the arroyos and the beaches?

MONASCH: "Not under the zone that you are proposing, because the PD would be only on the 43 acres that you are suggesting for the R-1-6. By the way, I hope you met (sic) R-1-6-PD.

SANSON: "That is what I said." p. 5

FORBUS: ". . . the 60 some acres in the U-BS-50 which would be acutally (sic) two dwellings in the other remainder, right?

MONASCH: "Actually one, 67 is U-BS-50 and you can only make one 50 acre parcel out of it." pp 9-10

FORBUS: ". . . Well, I have a couple of comments Mr. Chairman, I think that this is probably one of the most studied areas that we have, it seems reasonable to be (sic) that this Board could come up with a density that it could live with in this area. What we are doing now basically is telling the property owner, well, we have looked at it, and we have looked at it, and we have looked at it and we are not going to tell you what density you can have, we are going to send it back to the Planning Commission to say theoretically you can go one house on 67 acres of the beach which is in itself utterly ridiculous." p. 18

FORBUS: ". . . Just a couple of more sentences here, I think that you know, a pendulum swings back and forth, it never stops in the middle, it is always over on one side or the other, and it has swung so completely that the only

place a property owner or a man who owns anything has place to get regress now is in the courts." p. 19

I hereby certify that the foregoing is a true and correct copy of a portion of the Official Records of the Santa Cruz County Board of Supervisors, dated November 28, 1972:

COUNTY BOARD OF SUPERVISORS

By _____
DEPUTY